CIV/APN/390/93
CIV/APN/510/93

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between

KOSE JOSHUA MAFEREKA — Applicant

and

TLALI LEFETA — 1st Respondent
THE DEPUTY SHERIFF — 2nd Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice W.C.M. Maqutu
Acting Judge on the 26th day of January,
1994.

For reasons that will be obvious in the judgment, I shall refer to Applicant Kose Joshua Mafereka as the First Respondent and the First Respondent as the Applicant. This is being done to avoid confusion

This is an application for rescission of judgment. It is now also accompanied by an application seeking to protect the motor vehicle (the property that is the subject of this application) from

deterioration by having it taken away from the parties to have it kept by the Deputy sheriff pending the finalisation of this application.

On the 13th September, 1993, applicant instituted these proceedings in CIV/APN/390/93 by way of urgent application ex parte before this court and obtained the following order:-

"1. A rule nisi do hereby issue calling upon the Respondents to show cause, if any, on the 27th day of September, 1993 at 9 30 a.m. in the forenoon or so soon thereafter as the matter may be conveniently heard why.-

(a) In the event of Third Respondent deciding that there is no justification in holding the 1989 Model Toyota Hiace with chassis and engine numbers YH63V9005607 and 4Y9035328 respectively, presently bearing registration number OG14799, the deputy-sheriff shall not be directed to seize and keep the same in safe custody pending the finalization of this application;

(b) The vehicle described above shall not be released forthwith to Applicant herein,

(c) First and Second Respondents shall not be directed to pay the costs herein,

(d) Granting Applicants such further and/or alternative relief as this Honourable Court may deem fit.

2. That rule 1(a) operates with immediate effect as a temporary interdict."

Mr. Khasipe an attorney (on behalf of First Respondent) filed of record a notice of intention to oppose this application on the 17th September, 1993. Elias Mokhosi who is central to this proceedings and who was cited as Second Respondent did not oppose this application. The Police and the Attorney General also did not oppose this application.

On the 27th September, 1993 the Rule Nisi was extended to the 18th September, 1993 On the 18th October, 1993 the Rule Nisi was confirmed by default.

According to First Respondent, he first knew of this judgment by default on the 25th October, 1993. He claims no answering affidavit was made because Mr. Khasipe his attorney told him he was negotiating a settlement. The vehicle which is the subject of this application (as a result of that judgment by default) is now in the Applicants possession and is being used as a taxi Mr. Nathane (counsel for applicant) in reply to the allegation that negotiations for a settlement were in progress, in his affidavit dated 16th January, 1994 said.

> "I deny my client ever suggested a meeting between the parties The converse, was rather the situation and I promised Mr. Khasipe (applicant's counsel) that I would sell the idea to client."

In the light of the aforegoing, it is clear that First Respondent is telling the truth when he said his attorney gave him the impression that he had approached the other side with a view to settling this matter. It is clear nevertheless that his own attorney let First Respondent down.

Rule 27 of the High Court Rules, 1980 provides that the Respondent may within 21 days after the judgment has come to his knowledge apply to court (on notice to the other side) to set aside such judgment. For the Court to come to Respondent's assistance he must show good cause by giving a reasonable explanation of his default The court must be satisfied that the application is seriously made by a person who ought to be heard because he has a reasonable defence on the merits. It will not grant the application if it is satisfied that granting the application will be a waste of time. It has nevertheless to be remembered that the courts always feel obliged to hear both parties. Nevertheless court's will not readily come to the assistance of a

party that wilfully neglects court's process and is grossly negligent.

Kheola J. in Simon Makepe v Metropolitan Homes Trust CIV/APN/278/88 (unreported) had occasion to deal with a situation in which a Respondent's attorney through a mistake or failure of some kind caused a judgment by default to be taken. He rescinded the judgment after saying :

> "I am convinced that the applicant cannot be denied the relief it is applying for because its attorneys neglect cannot be imputed to it."

Kheola J. further said:-

> "There are numerous cases which deal with the negligence of an attorney in failing to do certain things for his client .... One such case 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 to the effect of an attorney's negligence .. . or to lay down that a certain degree of negligence will debar client and another degree will not It is preferable to say the Court will consider all circumstances of a particular case . .. in the exercise of its wide judicial discretion, that, sufficient

> cause for granting relief has been shown "

I agree with Kheola J. but wish to add that it is very unwise not to stick to the Court Rules in the belief that the audi partem rule will always incline the Court towards rescinding a default judgment. Applying for condonation of breaches of the rules of court can be a risky venture which ought to be avoided.

It is accepted, therefore, that where a default judgment has been taken through no fault of a litigant a rescission of judgment is often granted. Rescission of judgment is nevertheless a discretionary matter. Negligence of an attorney will not always persuade the court to rescind judgment. Culpable remissiveness of a party (which may also include the attorney's negligence) might be of a nature that in the particular circumstances of a case, the court might feel obliged to dismiss an application for rescission of judgment Each case has to be dealt on its merits and the courts discretion (like all discretions of its type) has to be exercised judicially.

The court in dealing with a rescission of judgment has to determine whether or not the First

Respondent has a bona fide defence If he does not, then the court ought to refuse to rescind the judgment although it was granted through no fault of First Respondent. That being the case, the court is obliged to go over the merits.

In Sanderson Technitool (Pty) Ltd 1980(4) S.A. 576 at 576 Coetzee J. said the court does not delve too deeply into the merits Even if in the application for rescission he has left some details, the court is entitled to assume, these might appear in his plea So long as the defence raised is not excipiable and on the simple facts deposed to, the matter cannot be decided finally as a matter of law, the court will be inclined to grant a rescission of judgment. What is clear is that judgments on rescission are not always easy to reconcile because the circumstances of cases have a bearing in the exercise of the courts' decisions

The courts in going over the merits often lean over backwards to accommodate a party against who a default judgment was granted, because of the principle that both parties should be heard for justice to be seen to have been done. In Grant v. Plumbers (Pty)

Ltd 1949(2) S A. 470 the court rescinded judgment most reluctantly and showed its displeasure by an appropriate order as to costs. According to Kennedy J in Naidoo v. Cavebdush Transport (Pty) Ltd 1956 (3) S.A. 244 at 248 all this respondent has to do to show he has a bona fide defence in.-

> "setting averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of his case, and produce evidence that probabilities are actually in his favour "

The court on the facts before it finds that both parties are putting all their troubles at the door of one Elias Mokhosi from Ficksburg in the Republic of South Africa, Applicant paid a deposit of about M16,000.00. Mokhosi obtained a loan which applicant was to pay directly to Mokhosi's bank. It seems Mokhosi registered the vehicle in his own name in Ficksburg in January, 1991 Applicant registered the vehicle in Applicant's own name in September, 1991. Applicant claims he bought this vehicle in June 1990. There are a few unclear facts. One day in June 1992, Elias Mokhosi took away the vehicle in the absence of Applicant.

In September, 1993, applicant found this vehicle in the hands of First Respondent and he forcibly took it while First Respondent was trying to register it. The matter ended with the police who released it to First Respondent. Applicant again seized it and took it to the police. He appears to have moved court for an ex parte order which more fully appears on page two of this judgment. This is the order that was confirmed by default and in terms of which applicant gained possession of the vehicle.

First Respondent on the face of the papers appears to have bought this vehicle in good faith from Mokhosi a year after Mokhosi took it way from Applicant. Mokhosi claims to have seized the vehicle because applicant had not paid the bank loan and was in arrears Mokhosi has annexed in the replying affidavit a letter dated May 1993 that shows the Applicant was three months in arrears This was eleven months after Mokhosi has seized the vehicle There is no doubt self-help is not allowed. On the face of the papers Applicant probably was not in arrears.

There seems at this stage no grounds not to treat

First Respondent as a bona fide purchaser who bought the vehicle from Mokhosi its registered owner It now has a different engine. There is no doubt that on the face of the papers First Respondent has a bona fide good defence. The court is, therefore, obliged to rescind this judgment.

Applicant's case has many similarities to the case of Seth Lieta v. Semakale Lieta C. of A.(CIV) No.5 of 1987 (unreported) There the appellant from Lesotho had bought in Botswana a vehicle through Respondent. The reason for this was that Respondent was a Botswana citizen and could be given credit in Botswana. This vehicle was registered in Botswana and promptly taken to Lesotho by appellant. One day Respondent brought an urgent application in Lesotho claiming the vehicle because he was its registered owner. There were conflicts of fact and viva voce evidence was heard. The Court of Appeal upheld right of possession of the Lesotho party that had bought a vehicle in Botswana through a Botswana citizen.

There is no doubt this matter is urgent and consequently it was proper for the vehicle to be kept somewhere pendente lite. The nature of the contract

between applicant and Mokhosi is not clear from the papers. The rights of the bona fide purchaser are protected by law. The court is not obliged to go into the merits at this stage. It can only alert the parties to the danger of over-confidence.

It seems to the court in the circumstances best for all parties concerned that the vehicle be returned to the Deputy Sheriff for safe keeping pending the finalisation of this application. This disposes of CIV/APN/510/93 Nevertheless some one must pay costs up to now and it is First Respondent Kose Joshua Mafereka who must. Negligence of his former attorney does not absolve him in this respect.

The court makes the following order:-

(a) Rescission of judgment is granted and the First Respondent/Applicant (Kosi Joshua Mafereka) is directed to pay costs of these proceedings up to this stage.

(b) The Rule Nisi is revived and extended to the 21st February, 1994. First Respondent (Kosi Joshua Mafereka) is directed to see to it that his opposing affidavits are filed by the 15th February, 1994.

(c) The court orders Tlali Lefeta the Applicant/First Respondent to return the vehicle to the Deputy Sheriff who is Second Respondent in this matter for safe keeping pending the finalisation of this application

W.C.M. MAQUTU
ACTING JUDGE

26th January, 1994

For Applicant : Mr. Nathane
For Respondent: Mr. Khasipe