CIV/APN/52/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MAMANINI PINKIE MOLATSELI	APPLICANT
AND	
'MATIKOE HIGH SCHOOL	RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu, on the 28th day of October, 1994

This is an application for stay of execution and for rescission of judgment.

Rescission of judgment was granted on the 25th October, 1994 and these are the reasons.

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Before giving the reasons I must point out that it is unnecessary for another file with a different case number to be opened for a rescission of judgment application. The judgment that is being rescinded is CIV/APN/36/94 while this application for rescission of judgment is CIV/APN/52/94. Considerable confusion was caused at the hearing of the rescission application because Mr. Mahlakeng for Applicant did not have the return of service in CIV/APN/36/94. He only had a return of service in which Applicant's property was thrown out of the house of Applicant. The file CIV/APN/36/94 was not before the Court when the problem of service arose.

I called for the file in CIV/APN/36/94 to ascertain the facts. In that application the present Respondent Matikoe High School is the Applicant, while Mannini Pinkie Molatseli, the present applicant, is the Respondent. Judgment as already stated had been given. This is what I found when I perused the file.

1. On the 10th February, 1994 Mr. Nchela for Applicant was before Lehohla J. to move an *ex parte* application. Lehohla J. ordered that Respondent be served and postponed the matter to 14th February, 1994.

2. There is a return of service that shows that Respondent was served on the 11th February, 1994. This was filed on record on 14th February, 1994.

3. On the 14th February the Rule was confirmed as prayed.

As there never was a *Rule Nisi* issued the wording of the order was incorrect. What the Court did on that day was to grant Applicant's urgent application which was on notice by default because of Respondent's failure to appear on the date of hearing. It can be assumed that the normal rules of service were dispensed with.

It could be argued that the Order of the 14th February, 1994 was granted by mistake in the form it was made. Whether the Court intended the application to be disposed of on the 14th February, 1994, after Respondent had been served in terms of its order of 10th February, 1994, is not clear. The Court might have intended to grant the *Rule Nisi* on that day rather than finalise the application. I notice the Order that was served on the Respondent is not in the form that the Court granted. Mr. Mahlakeng's view is that the Court did not make a mistake. If that is so, why did he change the Court Order or correct it? It

would seem since Mondays are motion days and on such days the Court deals with over fifty matters, a mistake of this kind was possible.

According to Respondent (who is Applicant in these rescission of judgment proceedings) she instructed her attorney who prepared opposing papers but came to Court two hours late to find judgment has been given. Mr. Mahlakeng who appeared for Matikoe High School the Applicant/Respondent, he does not dispute that this is what in fact happened.

The Court Order in respect of which the rescission of judgment application has been brought (as drafted by Mr. Mahlakeng for Respondent) is as follows:

"1. (a) Respondent be and is hereby directed to desist forthwith from unlawfully interfering with, hindering and/or disturbing the management of the Applicant in the execution of its duties;

(b) Respondent be and is hereby restrained from dealing in any manner whatsoever, with the

property of the applicant, being a house situated at the school premises without the authorisation of the Applicant and/or its agents;

(c) Respondent be and is hereby directed to vacate the house of the Applicant situated at the Applicant school premises;

(d) Respondent be and is hereby directed to pay the costs of this application.

Mr. Mahlakeng's argument is that this is not a default judgment. It is a final order of the Court. Therefore Mr. Mahlakeng says it ought not to be rescinded like a default judgment. What then is a default judgment?

In *Katritsis v de Macedo* 1966 (1) SA 613 at page 618B Van Blerk J.A. said of the term default:

> "It is clear from the authorities that default in regard to the defendant is not confined to failure to file the necessary documents required by the rules in opposition to the claim against him, or to appear when the case is called, but comprises also failure to attend court during the hearing of the matter."

This is precisely what Applicant did on the 14th February, 1994. When the matter was called applicant failed to appear. Respondent proceeded with the application in CIV/APN/36/94 and obtained an order against Applicant. Therefore as Neser J. said in *Meet Leather Works Co. v African Sole and Leather Works (Pty) Ltd.* 1948 (1) SA 321 at 325,

> "Whatever the reasons may have been..., the judgment is a judgment given in the absence of the party against whom it was given."

Mr. Mahlakeng argued that a rescission of a final Court order can only be brought in terms of Rule 45 of the High Court Rules 1980 in this case. The procedure laid out in *Rule 45* of the *High Court Rules*, 1980 is not meant for Default Judgments. It is meant for all judgments and orders that were obtained erroneously, in the absence of an affected party. A default judgment though sometimes obtained in the absence of a party is not erroneously obtained. It is deliberately obtained in the absence of a party. There is no error if a court at the appointed time proceeds in the absence of one of the parties provided that party was notified. In this case Applicant had been properly notified.

Is there in our practice any difference between an Order and a judgment?

Sisson in *The South African Judicial Dictionary* (Butterworths, 1960) says,

> "The term *order* is a technical one, which is in common use in courts of law and which is well understood, though it may not be easy to give a precise definition of it."

The difficulty of distinguishing between an Order and a Judgment is complicated by the contextual meaning which the term Order assumes from time to time. For an example Innes A.C.J. in *Dickson and Another v Fishers Executors* 1914 AD 424 at 427 said:

> "If it were necessary to distinguish between a judgment and an order, the difference would probably be this, the term judgment is used to describe a decision of a court of law upon relief claimed in an action, while by an order is understood a similar decision upon relief claimed not by action but by motion, petition or other machinery recognised in practice."

This distinction that Innes A.C.J. hazarded in *Dickson & Ano. v Fishers Executors* does not take into account in the High Court matters which a suitable for action proceedings, but which are in our modern practice brought by way of motion provided a

dispute of fact is not expected.

Claasen's *Dictionary of Legal Words and Phrases* Vol. 2 gives a definition of judgment that includes orders:

> "Judgment is a sentence or decision of a judicial officer sitting in his court."

It will be observed that when we deal with execution judgments the words judgment and order as used interchangeably. See Jones & Buckle *Civil Practice of the Magistrate's Courts of South Africa* Eighth Edition, Volume I page 237. The learned authors style judgments sounding in money as Order *ad pecuniam solvendam* for which a warrant of execution has to be issued. They style those judgments which can be put into effect through contempt of court proceedings as *Orders ad factum praestandum*.

In view of the fact that claims can be brought by way of action or motion depending on whether a matter is disputed or not, there is usually no real distinction between an action and an application. See Herbstein and Van Winsen *Civil Practice of the Superior Courts of South Africa* 3rd Ed page 60. In application proceedings affidavits constitute both the evidence

and pleading. Therefore an application which is a substantive action can be rescinded in terms of *Rule 27(6)(a)* of the *High Court Rules*, 1970 if it has been granted by default.

Complaining of the menace the claims brought by way of Notice of Motion when they should have been brought by way of action, Price J. in *Garment Workers Union v de Vries* 1949 (1) SA 1110 at page 1162 said:

> "Applicants thereby obtain great advantage over litigants who proceed by way of action and who may have to wait for many months to get their cases before the court. Such applications *cum* trials interpose themselves, occupying the time of the judges and still further delaying the hearing of legitimate trials.

Furthermore when a party proceeds by way of motion the respondent loses the tactical advantage which he might have had in the event of the institution of a trial action. See Herbstein and Van Winsen *Civil Practice of the Superior Courts of South Africa* 3rd Ed at page 64. The use of action and motion proceedings interchangeably has now crystalised into part and parcel of our practice subject to the dispute of fact condition.

Over the last 50 years in the High Court motion proceedings for ejectment and other matters fit for action proceedings have

been sanctioned where no dispute is not expected. See *Minister of Native Affairs v Sekukuni* 1958 (4) SA 99 at 101. Our Rules have to take into account this reality.

As there is no dispute on the fact that Applicant is not in wilful default the only question left is whether there are prospects of success in the main action.

It seems Applicant, who is a teacher, is being ejected from school houses that have been built for teachers in order that they can be near the school. What was agreed when the teacher occupied the teaching staff housing is not clear. There seems to be some misunderstanding between this headmaster and the teacher in question. The School Board supports the Headmaster and wants the Applicant out of the premises. Applicant seems to be implying that she considers it her right as teacher to have accommodation near the school. Whether this expectation is legitimate or not is a matter that has to be properly canvassed.

In my view Applicant has a defence, whose merits can be determined at the proper hearing of the matter.

Security has been given and rules complied with generally.

I therefore rescinded the judgment.

By agreement of the parties, costs shall be costs in the main application.

Applicant is directed to file her opposing papers by the 7th November, 1994.

W.C.M. MAQUTU
JUDGE

For Applicant : Mr. H. Nathane
For Respondent : Mr. T. Mahlakeng