

CIV/APN/252/93

IN THE HIGH COURT OF LESOTHO

In the matter between

CHIEF TUMISO POSHOLI

Applicant

and

CHIEF SAKOANE KHOSI LEKHOOANA

Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge of the High Court on the
28th day of February, 1994

On the 5th February 1988 my brother Justice M.L. Lehohla made an order of Court under case number CIV/APN/253/83 (the First Application) which read

" The proceedings and the decision of the First Respondent in the matter of Chief Tumo Posholi and Chief Sakoane Khosi Lekhooana are set aside". In the First Application Chief Sakoane Khosi Lekhooana (the present Respondent and the only Respondent) was the Applicant. The then Respondents were as follows

(a) Chief Tumo Majara (Chairman of the

Boundary Commission)

- (b) Chief Tumiso Posholi,
- (c) The Solicitor General;
- (d) Minister of Interior.

Being dissatisfied with the said Order of Justice Lehohla, the present Applicant filed a notice of motion on the 10th May 1990, for the following orders

- (a) Rescinding the Court Order in CIV/APN/253/82 on the ground that it was obtained by mistake or fraud.
- (b) Directing Chief Sakoane Khosi Lekhooana the Respondent herein and Applicant in CIV/APN/252/83 to pay costs of the Applications. You are expected to indicate before the 21st October 1990 if you intend to oppose the application.

While the first application was obtained by default of appearance of the respondents including the Applicant herein, the instant application was opposed. It is significant to note that of the parties having interest in the first application and who were parties thereto only the Respondent herein has been cited in the instant application. The Respondent filed his answering Affidavit and Applicant later filed his replying Affidavit.

An application for stay of Execution was filed by the Respondent about a year later on the 9th October, 1990 under case number CIV/APN/242/90. There was no Interim Order for stay of Execution. The application asked for stay of execution against that Order made by Justice Lehohla.

I decided that both Applications, namely, that for rescission of judgment and that for stay of Execution be heard together. This was seen by all to be convenient by reason of the fact that, among other considerations, as is the practice, those two prayers or issues are normally dealt with in one application.

On the day prior to the day of hearing the Applicant then filed another Application on a notice of motion set down for the following day namely the 15th December, 1993. In this one Applicant asked for the following Orders:

- (a) Deleting paragraph 8 of the founding Affidavit of the Application for rescission of Judgment in CIV/APN/252/83.
- (b) Costs of suit.
- (c) Further and or alternative relief.

As a result of this latter application Miss Ramafole for Respondent asked for a postponement to consult and decide on what steps to

take. She also asked for wasted costs of the day. I ruled that the question of costs be deferred to the date of hearing. An Opposing Affidavit was filed in opposition to this application. Fortunately the relief sought in the application was not persisted in and was abandoned. Perhaps it is instructive to set out the paragraph 8 for the benefit of the judgment.

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I have caused security for costs to be paid into court."

But the security for costs was never paid. Indeed, after argument I was inclined to awarding wasted costs of the 15th December, 1993 to the Respondent. I did so order.

The reason why the Applicant asks for rescission of judgment in CIV/APN/252/83 is that he was not aware of the proceedings themselves and neither was he aware of the judgment or order until February, 1990. I am convinced on the facts that the Applicant was duly served with the Application papers. To the original papers he attached his mark which was witnessed by two people. He is illiterate. This was shown to the Judge on the 5th February, 1988, together with the Deputy Sheriff's return dated the 23rd November 1983, showing that the Applicant was served on the 22nd November 1983. The Applicant did not take any action until about two years after the matter was placed before my brother

Justice Lehohla. Indeed there had been another notice of set down (for hearing of the matter) before the actual date of the issue of an order by the Judge. Miss Ramafole submitted citing rule 27(3) that she was not obliged to serve Applicant with any of those notices for set down for hearing. I agree.

As a result of some local incidents to do with reserved pastures, or disputes of like sort, the Applicant was called before his senior chief on the 7th February, 1989. It was on this occasion when the order of court of the 5th February, 1988 was read to the Applicant and several villagers of the disputing chiefdoms. It cannot be true therefore that the Applicant first knew of the existence of the Order of Court of the 5th February 1988 in February 1990, as he says in his papers. It was only on the 10th May 1990 when the Applicant approached this Court as said before. Miss Ramafole then submitted that the Applicant fell foul of the Rule of Court 27(6)(b), in that he filed his application after two years and two months or alternatively after one year and seven months, if it is considered that the Applicant says he received the papers in February, 1990. If the Applicant did only know of the application in February 1990, he has, in my view taken an inordinately long time to come to this Court. As said before the best that can be said for the Applicant he received knowledge of the application in February 1989. This is for arguments sake. He came into knowledge quite before.

I believe that the Court's powers to set aside a default judgment in terms of Rule 27(6)(a) are additional to its powers to set aside a judgment in terms of Rule 45 or in terms of Common Law (see HARDROAD (PTY) LTD vs ORIBI MOTORS (PTY) LTD 1977 (2) SA 576 (w), ROOPARIAN vs KALMALAPATHY 1971 (3) SA 587 (1)) 389, A-B). This means that when one applies for rescission under Rule 45 he should at the same time strive to comply with Rule 27(b) at the risk of his application failing and being refused. This more so when the Order sought to be rescinded was in default. These are the requirements of the rule.

- (a) The application must be made within 21 days of the applicant knowing of the judgment.
- (b) Applicant must furnish security to the satisfaction of the Registrar for the other parties costs.

It is common cause that the Applicant has failed to comply with both these requirements of Rule 27(6). Mr. Mohapi for the Applicant submitted that as the Application being made in terms of Rule 45 he is not obliged nor was he bound to comply with the requirements of Rule 27(6) "which is prescribed only for action proceedings." I rejected this submission. Rule 45 merely states the powers of the Court in variation and rescission of judgments. It prescribes further such procedural conditions that the Applicant must comply with. These conditions are not intended to prescribe

for anything that is different and not in contemplation of Rule 27 (6). They are not a substitute therefor. They are merely additional as said herein before. I observed that Applicant has not even sought to explain his inordinate delay nor to apply for condonation of the delay (see RAKAIBE vs FICKSBURG GARAGE 1963 - 1966 HCTR p244).

In an application for rescission the Applicant must in addition also satisfy the Court as to

- (a) That he has a reasonable explanation for his default.
- (b) That his application is being made in bona fide defence to the Respondent's claim.

When regard is had to the service of the Application, I already found in favour of the Respondent. As to the time Applicant came to know of the Order of Justice Lehohla and the delay in approaching the Court, the attempts by the Applicant to explain his default came out to be spurious indeed. I have looked at paragraphs 4, 5 and 6 of the Applicant's founding Affidavit. They are difficult to believe. I have also heard the Applicant's Counsel in developing the submission. I must say with respect that I was not persuaded. I did not find anything in the Application to indicate that the Applicant had bona fides in the application except that the application was made in response to

local disputes hence that meeting of the 7th February 1989.

I have formed an opinion that this question about the effectuality of the Order made by Justice Lehohla, have to do with the problems of the execution of judgment. My other view is that the Applicant can still approach the authorities administratively for all problems that arise. The question about that the Court powers are ousted in matter of decision made by His Majesty or that has attracted his approval in a boundary decision did not ultimately come out is Counsel's arguments. I do not comment on it. I do not believe that Miss Ramafole misled the Court when she approached the Court on the 5th February 1988.

I am satisfied that there has not been proof of error or mistake common to both parties as envisaged in Rule 45(a) and (c) I am persuaded that that on the question of absence of security for costs in contravention of Rule 27(b)(b) this application ought to fail (see THABO FRANCIS LEHOLA vs GETRUDE NOBELUNGU MTHEMBU & OTHERS (4th June, 1992) CIV/APN/219/93) (unreported), LEHLOHONOLO KHOBOKO vs BARCLAYS BANK & ANOTHER CIV/APN/348/88, (31st May 1993) (unreported), M. RANKHETHOA AND ANOTHER vs MANTOA LETUKA AND ANOTHER CIV/T/430/84 (29th April 1991) (unreported).

The application for stay of Execution should also accordingly fail. The contents of paragraph 4 of the Applicant's Founding Affidavit to the Application for stay indicate quite

clearly that it was motivated more by what are normally local and disputes in this instance, grazing and reservation of pastures that developed after the Applicant had known of the Order of Court. This is even more clearly explained by the fact that the applications were even filed separately. Indeed the latter application would have to depend on the soundness and efficacy of the application for rescission. It did not stand the test.

The Order I make is that the application for rescission and the application for stay of Execution are refused. Costs are awarded to the Respondent including the wasted costs of the 15th December 1993.



T. MNONAPATHI
ACTING JUDGE

For the Applicant	Mr. Mohapi (Noted by Mr. Matabane)
For the Respondent	Miss Ramafole (Noted by Mr. Mathe)