

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MALEKETE MORATO

Applicant

and

JUDICIAL COMMISSIONER
MOLUPE LETLAKA

1st Respondent
2nd Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 22nd day of March, 1994

This is an application for an order in the following terms:

1. A Rule Nisi issue returnable on a date and time to be determined by this Honourable Court calling upon Respondents to show cause why:
 - (a) First Respondent J.C. Mr. Ramashamole shall not be called upon to send to this Honourable Court the record of proceedings in J.C. 345\84.
 - (b) The Honourable Court on finding an irregularity in the conduct, of J.C. 345\84 shall not set aside the J.C.'s judgment
 - (c) Amount of M92.50 paid by applicant as costs in JC 345\84 shall not be refunded to her.
 - (d) That the hearing of CR 160\92 be suspended pending the outcome of

the Application for Rescission of Judgment.

- (e) Second Respondent pay costs only in the event of opposing this Application.
- (f) Further and/or alternative relief.

2. That prayers 1(a) and (d) operate as an interim Court Order operating with immediate effect.

The facts of this case are common cause and they are as follows:

On the 16th day of October, 1992 the first respondent gave judgment against the applicant's deceased husband Motlalepula Morato who was the respondent in J.C. 345\84. The respondent was not represented.

The said judgment was given in favour of the second respondent and confirmed that of Bela-Bela Local Court in CC 163\81.

In giving judgment the first respondent claimed to be basing himself on the return of service of the messenger of court which according to the first respondent showed that the deceased's son and heir had been served with the summons.

The applicant avers that when she scrutinised the said

return of service she found that it was written that the respondent Motlalepula Morato was deceased. (See Annexure "AA1").

The applicant refers to a document (See Annexure "BB2") which shows that after the judgment in J.C. 345\84 was delivered, Bela-Bela Local Court was still trying to find out whether the late Motlalepula had an heir who was of age, failing which it required the name of the deceased's wife. This inquiry by the Bela Bela Local Court was done in November, 1992 while the judgment in J.C. 345\84 was delivered in October, 1992.

I have perused the proceedings in this application and found that it is true that Annexure "AA1" is a return of service. It shows that on the 26th August, 1992 the messenger of court and in the presence of one Liphapang Molelle attempted to serve Motlalepula Morato. The return of service shows that "the person who was to be served or summonsed was dead". Despite this return of service clearly showing that the respondent was late, on the 16th day of October, 1992 the first respondent heard the appeal and upheld it.

There was no indication that the wife of the deceased (the applicant in the present proceedings) or the heir of the deceased was aware of the date of hearing so that she or he could apply

that she or he be substituted as the respondent. It seems to me that the first time they were made aware of the result of the appeal was when the applicant's property was seized in the satisfaction of a writ of execution in J.C. 345\84.

In his answering affidavit the second respondent avers that the judgment in J.C. 345\84 was based on the fact that a proper service had been effected on the defendant's family and that the applicant knew of this service and ignored it. In particular the applicant was served with her late husband's summons.

It is not correct that Annexure "AA1" shows that service was effected upon the applicant. It only shows that the respondent was dead. If the respondent had another return of service other than Annexure "AA1" he ought to have annexed it.

I come to the conclusion that an irregularity was committed when an appeal was heard in the absence of the late respondent's wife or heir despite the fact that the return of service clearly showed that they were not served.

In the result the rule is confirmed in terms of prayers (b), (c), (d) and (e).

J. L. Kheola
J. L. KHEOLA
JUDGE

22nd March, 1994.

For Applicant - Mrs. Kotelo
For 2nd Respondent - Mr. Hlaoli.