CIV/A/20/93

IN THE HIGH COURT OF LESOTHO

In the matter between :

S. M. KALEEM — APPELLANT

and

'MASESHOPHE HLAJOANE — RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 8th November, 1995

It was against the decision of the learned magistrate of Maseru, of the 1st September 1992, that the present appellant - who was Defendant, in the Court a quo appealed to this Court. The decision was in an application for stay of execution and setting aside a default judgment. Summons had been served on the Defendant on the 8th October 1991 and the application was filed on the 19th November 1991.

It was common cause that the Appellant (who I will call the Defendant) did not file any plea nor enter into

appearance to defend the action. He had before the 12th November 1991 and after service of the summons on him, contacted the Plaintiff's (now Respondent) Attorney for the purpose that "although I denied liability, I was prepared to compromise and settle for an amount we would agree upon." This is admitted with the terse reply that it was only on the 18th October 1991, that is two days after default judgment was granted that the approach was made. This time, as Plaintiff contended, the Defendant was informed about the fact that the judgment has already been entered. The Plaintiff made a further point in this regard that it was significant that the Defendant deliberately and conveniently avoided disclosing the date on which he went to Plaintiff's Attorneys' offices. This, in her submission corroborates the story that only after the judgment was her Attorney approached. The reply by the Defendant (in not mentioning any date) is not in my view very helpful. He says at paragraph 4.1 of his replying affidavit:

> "4.1 I deny that I only approached the Plaintiff's Attorney's on the 18th October 1991 and put deponent to proof thereof. I reiterate my averments in

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paragraph 3 of the founding affidavit."

When in paragraph 3 he had said:

"3.

On receipt of the aforesaid summons I immediately approached the Plaintiff's Attorneys with the intention of sorting out the dispute amicably in order to prevent unnecessary litigation which would cost both parties time and money. I was referred to Mr. Phafane of the firm of Attorneys G.G. Nthethe the Plaintiff's Attorneys."

Quite against the background of the summons commencing action, is the fact that on the 5th June 1991 a letter of demand in the same terms as the claim was made. A reply to the letter of demand was made on the 14th June 1991. It stated that :

"At the outset our client denies any negligence or recklessness whatsoever on his part. In the circumstances our client denies any liability whatsoever towards your client and we must advise that any action which your client may be advised

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to institute will be strenuously defended."

The point was made that as after the issue of summons the Defendant did not intend to defend the claim but rather opted for settling the matter out of Court. Otherwise he should have defended with the fervour shown in his reply to the letter of demand. And that could only by way of a timeous entry of intention to defend and the filing of a plea.

We came to observe from the papers filed in the said notice of application that the Defendant deposed that, while awaiting Mr. Phafane's response, it was on or about the 12th November 1991 (that is after thirty three days) when to his "surprise" the messenger of Court informed Defendant that he (the messenger) was armed with a Writ of Execution with which he wanted to attach Defendant's car. As a result Defendant approached his Attorneys who confirmed that on 13 November 1991 a default judgment had in fact been entered. It was the time that the Defendant (as he alleges) got such information. The Defendant averred that in the circumstances he was not in wilful default of entering appearance to defend. He said he trusted Mr. Phafane and was happy that if Plaintiff

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declined the offer Mr. Phafane would inform Defendant (as promised) and in that event he would immediately enter appearance to defend in as much as he had a valid and *bona fide* defence. It is to this circumstances that the Plaintiff replied that the defendant was in wilful default.

In suggesting that he (Defendant) placed his confidence in the Plaintiff's lawyer, not in his own attorneys, not only did Defendant ignore his own lawyer (who answered the letter of demand), but he had decided not to defend the matter. To go to Plaintiff's Attorney and seek to impute blame on him is to shift responsibility unfairly. This is compounded, much considerably, by the denial of the Plaintiff's Counsel. The denial amounts to averring most categorically that it was on the 18th October 1991 when he first had contact with the Defendant and when he informed him that judgment had already been taken. The Counsel went on to depose that (accepting that he agreed to speak to his client) later in the day he telephoned Defendant to advise that the offer to pay has been rejected. it was then that Defendant undertook to pay the judgment debt at the end of the month of October. This the Defendant did not do. The Plaintiff's Attorneys had in the

meantime not issued the warrant of execution. The Plaintiff asked the Court to take it as improbable that the Defendant waited for Plaintiff's Attorney's response from the 8th October to the 12th november 1991 or at all. Defendant was served with a warrant of execution on that date. I was being urged that the probability was more that the Defendant did not wish to defend, when regard is heard to that he is not an ignorant person and had consulted his lawyers before about the matter.

It has been said that :

"It is incumbent for an applicant seeking rescission of a judgment granted in default of appearance or in default of failing to show good cause and prove that he at no time renounced his defence and that he had a serious intention of proceeding with the case (Van Asweagen vs Mcdonald Foreman & Co. Ltd 1963 (3) SA 197)" per Cotran CJ, in Makalo Khiba vs L.E.C 1980 LLR 329 at 400. I was persuaded that the Defendant was in wilful default as the Court a quo correctly found. There is no doubt that the Defendant ignored the process of Court.

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In the circumstances above stated I would be reluctant to accept that there was sufficient cause entitling this Court to use its discretion in favour of the Defendant. This was not a case where the Defendant having intended to defend he merely delayed to file a pleading. Courts have frequently held that delay in filing a pleading, due to the fact that negotiations for a settlement were in progress at the time, the particular pleading should have been filed is sufficient cause to warrant the granting of the indulgence. (See Africa Plant Services vs Rainbow Construction (Pty) Ltd CIV/T/54/93, 14/09/94, unreported). This was not such a case. It is denied that, if ever there were any overtures about negotiating anything, such was before obtaining of the judgment by default. If it had been before obtaining a default judgment I would have said that the Plaintiff seemed to have condoned failure by the Defendant to file papers in time. The Defendant would then not be blamed for laxity or abuse of Court process.

I agree with the learned magistrate that the correct position in law is that "Before a person can be said to be in wilful default, the following elements must be shown :

(a) Knowledge that the action is being

brought against him.

(b) A deliberate refraining from entering appearance, though free to do so.

(c) A certain mental attitude towards the consequences of the default." (citing Jones & Buckle Vol. 11 7th edition at page 367).

It is on these tests that the magistrate therefore correctly found that the Defendant was in default of appearance.

It was submitted by the Plaintiff's Counsel that the two requirements of absence of wilful default and the existence of a *bona fide* defences must be met contemporaneously for a Court to grant rescission of judgment. That furthermore it was not sufficient if any one of those two requirements is met (see Jerome Ramoriting & Another vs Lesotho National Development Bank CIV/APN/136/87 (Unreported) and Mathakeng Khosi vs Mary Mamothibi Khosi CIV/APN/258/85 & CIV/APN/233/85 (Unreported) and authorities cited therein and Chetty vs

Law Society Transvaal 1985(2) SA 756 at 765 B-C).

When referring to the second requirement in an application for rescission the Plaintiff has submitted that the Defendant has failed to show that or merits he has a *bona fide* defence which *prima facie* carries some prospects of success. He has not placed before Court sufficient evidence as to his defence. Furthermore he must place before Court sufficient evidence from which it can be inferred that he has a *bona fide* defence to the action. A bare assertion of good faith is not enough (Negcezulla vs Stead 1912 EDL 110) per Cotran CJ in Khiba vs L.E.C. 1980 LLR 392 at page 400. The paragraph 9 of Defendant's affidavit seems to hold the key to what the Defendant spoke of as his defence. The paragraph reads:

"9

It will be noted from paragraph 6 of Plaintiff's particulars of claim that Plaintiff does not say how I was negligent in performing the said operation and when she became aware of my negligence. I verily aver that Plaintiff is the one who was negligent in that she did not take necessary precautions or follow the prescription

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which she was well aware of."

Perhaps the magistrate could have wrongly assessed the quantum of damages but I do not see how he went about wrongly in his proceedings under Rule 4(4) of the Order of the Subordinate Court Rules 1988 which reads:

> " The Clerk of Court shall refer to the Court any request made under Rule 2 or 3 of this Order for entry of judgment on a claim of damages and the Plaintiff shall furnish the Court evidence either oral or by affidavit of the nature and the extent of damages suffered by him. The Court shall therefor assess the amount recoverable by Plaintiff as always and shall enter judgment therefor."

The Plaintiff elected to put in her affidavit on the basis of which he proceeded and got judgment. It is this which the Defendant finds fault with.

The failure by the Defendant to inform as to what these necessary precautions or prescriptions which Plaintiff was well aware of, carried with it the risk that

the magistrate would not understand what his defence was. It is not even clearer now. Perhaps Defendant would have been able (if allowed to plead) to show that the Plaintiff did not prove how Defendant was negligent and when she became aware of the negligence. But this seems to me not to be the proper approach when regard is had to the onus that the Defendant bears of proving that he had a *bona fide* defence not for the Plaintiff to prove that the Defendant had no *bona fide* defence as a matter of onus.

The risk or the danger of a judgment by default was obvious to the Defendant. It means that not only was he denied an opportunity to defend in effect but the issues would not be fully ventilated. But it was of his own making. While the Court becomes occupied in bringing discipline and speeding up litigation it cannot be denied that the Defendant has not been heard. The Court proceeds on the basis that he has denied himself the opportunity to be heard. It is in such a case that the Defendant cannot be heard to say that the principle of *audi alteram partem* has been undermined. (See also generally GEORGE NTSEKE MOLAPO vs MAKHUTUMANE MPHUTHI & 2 ORS CIV/APN/188/94 W.C.M. MAQUTU J, 17th March, 1995 - unreported)

I was satisfied that the magistrate correctly found that the Defendant has been unable to present a reasonable and acceptable explanation for his default and that he has no *bona fide* defence which *prima facie* carries some prospects of success.

The appeal was accordingly dismissed with costs.

T. MONAPATHI
JUDGE

8th November, 1996

For the Appellant : Mr. Sooknanan

For the Respondent : Mr. Phafane