CIV/A/10/88

IN THE HIGH COURT OF LESOTHO

In the matter between :

ELLIOT SETLOLELA — Applicant

v

MOHANOE MALEFANE — Respondent

Before the Honourable Chief Justice B.P. Cullinan

For the Applicant : Mr J.P.L. Snyman

For the Respondent : Miss Ramafole

JUDGMENT

Cases referred to :

(1) R v Van der Merwe (1943) C.P.D. 25;

(2) R v Adkins (1955) 4 S.A. 242 (GW);

(3) R v Ngombe (1964) 3 S.A. 816 (RAI);

(4) Mohlakoana Mabea & another vs Magistrate of the 1st for Butha-Buthe & another CIV/APN/367/91, CRI/A/81/91

This is an appeal from a decision by the Resident Magistrate's Court in Leribe, granting an application for rescission of a default judgment. It can be said therefore that the Magistrate's decision was interlocutory and not final : see Jones and Buckle 7 Ed. Vol.I pp 289/290. The question nonetheless arises whether the Court should, *mero motu*, exercise

its inherent powers of review in the matter. That will depend on all the circumstances of the case.

The applicant ("the plaintiff') commenced an action in the Court below claiming the sum of M1,000, by way of debt, with costs. Six months later he applied for default judgment. Some two weeks later the Attorney representing the respondent (the defendant) appeared before the Court and secured an adjournment for two weeks, so that he might "obtain a brief" in the matter. Two weeks later, the plaintiff's Attorney appeared before the Court. There was no appearance by the defendant or his Attorney and the Court granted default judgment. For some reason, which will become apparent, the defendant had anticipated such default judgment and more than three weeks before hand had filed an application for rescission thereof. I rely here on the Magistrate's judgment, as I can find no trace of such application on the Court file.

The plaintiffs Attorney secured the issue of a warrant of execution on the same date that he obtained judgment. The writ was not however served for some ten months, whereupon, seven days later, the defendant's Attorney (a second Attorney) filed another application for rescission of judgment. I observe that the accompanying affidavit, however, was not sworn for another two weeks. Two months later, the defendants Attorney appeard before the Court, and secured an adjournment for two weeks, as the application had not been served. Some two months later the

plaintiff's Attorney, but not the defendant's Attorney, appeared before the Court. The application was adjourned *sine die*.

Nothing happened for another fifteen months until in execution of the writ. Some of the defendant's goods were attached. The application for rescission was once more set down, and approximately a month later the plaintiffs' Attorney (a second Attorney) appeared before the Court. There was no appearance by the defendant's Attorney. The former however was "informed to wait for the Judicial Officer to read the whole record." The Attorney however was not in attendance over an hour later when the defendant's Attorney (the third Attorney) appeared and was advised to set the matter down for another day, being granted costs of the day.

The matter was set down, over four months later, that is, more than two years and ten months after default judgment had been granted. After hearing argument the Magistrate, in a reserved judgment granted the application, making no order as to costs. He granted the application for rescission on two grounds.

One of those grounds was in effect, counter to the submissions made by the plaintiff's Attorney that the defendant was out of time and there was no application for condonation before the Court. He there relied on Rule 1 (1) of Order xxviii of the Subordinate Court Rules which read,

"any party to an action in which a default judgment is given may within one month after such judgment has come to the knowledge of the party against whom it is given apply to the Court to rescind or vary such judgment."

According to the Magistrate, the Plaintiff's Attorney notified the defendant's Attorney of the application for default judgment one month before such judgment was granted. That is why the, Defendant's Attorney filed an application for rescission and appeared before the Court ex parte, two weeks before judgment, apparently in the belief that judgment had been granted. As judgment had not been granted at that stage, the application for rescission, supported by an affidavit sworn before the event, could only be regarded as a nullity. There is in any event no papers in respect of any such application for rescission on the file before me.

The defendant did eventually, as I have said, file an application for rescission, but that was over ten months later, after the writ of execution was served. In the supporting affidavit he deposed that he had attended court on the date his Attorney had attended, that is, two weeks before judgment was granted. He avers that his Attorney had said he would inform him (the defendant) of the next date of hearing. He does not explain however why he failed to hear the date (two weeks later) announced by the court. Thereafter he avers.

"I was notified by the messenger of Court that default judgment had been granted against me and I approached (the defendant's Attorney) who prepared papers for rescission and (*sic*) frequented his offices for a feedback on the progress of the case and he assured me that he was still proceeding with it".

Thereafter the defendant avers that he was served with the writ of execution, that is, ten months after judgment. He does not explain why, when he knew a judgment had been granted against him, he was content to leave matters in the hands of his Attorney, for so long, without any positive news of rescission, and why he should change Attorney only when the writ of execution was served. In this respect the defendant did not state exactly *when* he was informed of the judgment by the messenger of the Court, as one would have expected him to do. His affidavit indicates that some time passed, before the writ was served upon him. The probabilities therefore are that the defendant was well out of time when the application for rescission was lodged. The Magistrate nonetheless impliedly found that the defendant had only learnt of the judgment when he was served with the writ, which is contrary to the import of the defendants affidavit, and therefore held that the defendant was not only out of time. He clearly was out of time, however, and an application for condonation should have been filed.

In any event, the prosecution of the application for rescission was a matter for the defendant. It took another twenty-two months before the matter was finally set down for hearing, yet the Magistrate was not concerned with such delay, which clearly could not be laid at the plaintiff's door. The Magistrate nonetheless observed that

> "If the learned Counsel (for the Plaintiff) thought the other side was playing a delaying tectic he ought to have set the case down for hearing and ask the Court to dismiss it for (want) of prosecution if the other party is missing."

That may well have been a Counsel of wisdom, but in the matter of delay, the onus was upon the defendant to satisfy the Court that there was good reason therefore. In this respect the Magistrate observed.

> "It cannot be said applicant was sitting idle and doing nothing because if he did he could not have changed Counsels. This shows he wanted an Attorney who could work."

On the papers before the Magistrate, that observation can only be regarded as an unwarranted assumption, and indeed a most unfair and improper one, in respect of the first two Attornies involved.

Further, the judgment had been obtained regularly, and it is an inflexible rule that in such circumstances, if rescission is sought, the defendant must show a defence on the merits. In this respect, the defendant deposed no more than that he had a counterclaim in the amount of M400, in respect of repair to the plaintiff's vehicle, which he was retaining, in exercise of a repairer's lien, until paid the said sum. Whatever about the latter aspect the Magistrate simply had no power to set aside judgment in the admitted amount of M600. As to the amount of M400, the Magistrate was dealing with an avernent made two years previously, and under those circumstances I would have thought it incumbent upon the defendant to satisfy the court that such lien was still being exercised and that the counterclaim was still in existence. The Magistrate, however, never considered the merits of the proposed defence.

All of the above aspects are matters for consideration on appeal, were an appeal to lie, and which indeed would ensure the success of such appeal. There is another matter however which comes within the ambit of review.

The Magistrate relied upon the provisions of section 21 (2) of the Subordiante Courts Proclamation, no.58 of 1938 (see now section 21 (2) of the Subordinate Courts order, No.9 of 1988, although those provisions had not been raised or argued before him. Those provisions read

"(2) The Court may rescind or vary any judgment granted by it which was void ab origine, or was obtained by fraud or by mistake common to the parties".

Very early in his judgment the Magistrate referred by name to the two Attornies who had initially appeared for the plaintiff and defendant respectively. He then observed:

"I may mention here that these two Counsels work in office opposite the court room behind Fairways and they use one office. I am aware this is not in the papers but since we live in the same Locality here the Court takes judicial notice of this. It is surprising how they could represent peple of different interests in the same case. I doubt not their intergrity but one of their clients had to suffer. It is not clear how and why they worked in such a way that the other client should get superiority over the other by way of default judgment. Normally these two counsels freely appear for each other's clients in this courts. In the circumstances the former plaintiff's Attorney still owed defendant a duty by nature of mutual co-operation with his Attorney which duty he did not properly discharge because he acted in the interest of his client only."

The Magistrate then quoted the above provisions of section 21 (2) and proceeded,

"In my mind under the circumstances I have described this *Default judgment was obtained by fraud and I would have no alternative but to rescind it. To me it was unethical."*

While a Magistrate may take judicial notice of matters notorious in the area where the court sits (see e.g. Rex vs Van der Merve *(1) and* Rex vs Adkins *(2)), he may not rely on his personal knowledge of matters which are not notorious, even locally: see e.g.* Rex vs Ngcombe *(3) where* on appeal it was held that a Magistrate could not take judicial notice of the fact that the foyer of the premises of a leading local newspaper was open to the public as a reading room. In the present case, it cannot by any stretch of imagination be said that the working conditions of the two Attornies was notorious.

But of far more concern in the Magistrate's unwarranted intrusion into the Attorney and client relationship. About the only assumption that a Magistrate can make in the matter, is that the Attorney appearing before him, as an officer of the court, is duly instructed by his client, no more than that. To make matters worse, on the one hand the Magistrate says of the two Attornies, "I doubt not their integrity": thereafter he describes their conduct (or is it that of the plaintiff's Attorney?) as "unethical". Having already concluded that the judgment "was obtained by *fraud* ". Quite obviously there was not the slightest evidence of fraud, or unethical conduct for that matter, before the Magistrate.

The issues there traversed by the Magistrate were never raised before him. It was bad enough that he did not judicially apply his mind to the issues before him, in that he took into consideration matters which were completely irrelevant, to such an extent that I am bound to say that he was "on a frolic of his own," it is a matter of grave concern that in doing so he recklessly impugned the character of two officers of the court.

The Magistrate's attitude persisted throughout his judgment, in that he placed the blame for the delay in the matter, without any application for condonation before him, seemingly at the door of the defendant's Attorney, saying that the defendants "wanted an Attorney who could work". Indeed his attitude in the matter persisted to the extent that he failed altogether to apply his mind to the merits of the proposed defence.

The question arises as to whether this Court should exercise its power of review in the matter. I consider that the Magistrate's excursion into the role played by the respective Attornies, and the subsequent finding of fraud, were totally unwarranted, unsupportable and irrelevant. I consider that a gross irregularity was there involved, which permeated the remainder of the judgment. The plaintiff was clearly prejudiced in that he was after a delay of almost three years, deprived of the fruits of a judgment regularly obtained. The Court is always slow to intervene in Subordinate Court proceedings (see e.g. the case of (Mohlakoana Mabea & another vs Magistrate of the 1st

for Butha-Buthe & another (4)) but the irregularity involved is such that I consider that the Court should intervene mero motu in the matter. Accordingly the judgment of the Court below, rescinding the default judgment, is set aside. The said default judgment is confirmed. I grant costs in this Court and the Court below to the plaintiff.

Dated this 20th Day of January, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE