CIV/APN/339/94
(CIV\T\154\94)

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABO MICHAEL MOTSEKI	Applicant
and	
LESOTHO AGRICULTURAL DEVELOPMENT BANK	Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 7th day of March 1995

This is an application for rescision of judgment obtained by default by the Respondent/Plaintiff on the 21st November 1994. The Applicant/Defendant also applied for rule nisi to have the recision of the judgment or writ suspended pending the hearing of the application and other incidental relief. The matter concerned a case under number CIV/T/154/94 of this Court. Mr. Matabane conceded he was in default when that he came in late into Court after judgment was entered against his client. I suppose that had he been in Court the Court could have taken a different turn. For the meaning of the term default see Katsiris

vs de Macedo 1966(1) SA 1913 at 618B as approved in the judgment of Maqutu J in Mamanini Pinkie Molatseli vs Matikoe High School, 28th October, 1994 (unreported).

I did not find this application any unusual in any sense except that it is one of the many examples where the Rule 30(1) of the Rules of Court has been consistently ignored or where a party has not taken advantage of the rule where circumstances were proper. The rule reads:

> "Where a party to a case takes an irregular or improper proceeding or improper step any other party to such cause may within fourteen days of the taking of such step or proceeding apply to Court to have it set aside: Provided that no party who has taken any further step in the case with knowledge of the irregularity or improperly shall be entitled to make such application."

I have in the past once referred to the application of this rule in the matter of ICI Les. (Pty) Ltd vs K. Goosen CIV/APN/205/94, 27th July 1994 (unreported), in the somewhat more complicated setting of that matter. The Respondent conceded that if notice to file plea served on the Applicant served on the 15th July, 1994 it was irregular in that it had been made when the number of days allowed by Rule 22(1) had not expired. This was so when reference is made to the rule and the interpretation given to computation days as one will find in the interpretation of section of the Rules of the High Court Legal Notice No.9 of 1980. Mr. Matabane submitted that support could also be found in the

Interpretation Act 1977. It will be calculated that it could not have been more than 15 days after the notice of intention to defend had been filed. That was not after 21 days. Miss Mafoso for the Respondent accepted that to be the position. It was then upon the present Applicant to have taken advantage of the provision of Rule 30(1), but he did not. The notice to file plea had been irregular.

The Applicant then proceeded on the 21st July, 1994 to file a request for further particulars to the summons and declaration, that having been a combined summon. Again the Plaintiff ignored the Rule 30(1). The Plaintiff did not apply to set aside the request for further particulars. It appears that there was correspondence criss-crossing between the parties in which there was basic misunderstanding as to what to do about the notice to file plea and the request for further particulars. Respondent contends that the Applicant's Attorneys asked for time in which to call for and consult client who was in the Bothuthatswana in South Africa where he is employed since about the 1st April 1992. That is why after a considerable delay (in the Respondent's perception) a notice of bar was filed on the 28th October 1994. This was in terms of Rule 26(3). What did the Applicant do? He ignored the notice when he should have applied to Court in terms of Rule 30(1) to have the notice of bar set aside. This he could have done bearing in mind that he could not have fallen

out on the proviso to the rule. This would be proper since his attitude (rightly or wrongly) has been that he was still awaiting a reply to his request for further particulars. What is also important is that the Applicant may have felt that since the Respondent had not done anything or about against the request for further particulars, the request was still on the right footing.

The matter was on the 9th November 1994 to be set down for the 21st November 1994 for default judgment. After the filing of the notice of set down the Applicant served on the Respondent a notice of application to compel Respondent to furnish particular particular requested on the 21st July, 1994. This document was not in the Court's file on the day of the hearing of the application for default judgment. Neither was the notice of intention to oppose the notice to compel in the Court file. Both Counsels took blame for the absence of its respective process in the Court file. Again the Respondent treated the Notice to compel as if it was a regular process. This is so, because, in my view, filing a notice of intention to oppose does not evince an attitude or treatment one would expect when the process was being viewed as an irregular one. If the notice was regarded as irregular Rule 30(1) should have been invoked. The notice of intention to compel was also set down for the 21st November 1994. As to how the Applicant would go about dealing with the notice one does not really know. But the probability

is that it would have been brought to the attention of the Court when the Respondent stood up and applied for judgment.

I have made a lot of comment about how the parties should have conducted themselves in connection with the application of Rule 30(1). I would therefor make a finding that the Respondent has not proved its case that the Applicant was wilful nor *mala fide.* There is no doubt that there has been a transgression of the rules of Court which I cannot place at the door of the Applicant alone. But that to me is not a demonstration of wilfulness as contemplated in the Rules or as lawyers would understand that to mean.

Coming to the question of a defence on the part of the Applicant, I am inclined to believe that there is one in favour of this Applicant. Indeed one need not bring actual proof or proof to the level of evidence but the Court must be made to perceive or observe the existence of a defence of some kind. On this occasion it is that the Applicant alleges to have paid or in fact overpaid Respondent, the Applicant having paid on a scale of an ordinary customer when he should have paid as an employee of the Respondent. This may at trial turn out to be untrue but that is not the test. He still regarded himself as an employee of the Respondent, that also being the subject of a dispute still pending in this Court in some other case or cases. I have been

advised that I need not look into the request for further particulars in other to see whether there is something in the nature of a defence or a basis for a counter claim. This is correct. I would find that the Applicant does have a *bona fide* defence of some kind. Whether it will succeed or not is another matter.

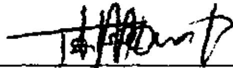
I come to this question of payment of security for costs of the default judgment and of the application for rescission of such judgment as envisaged under Rule 27(6)(b). In so doing I also note that in order for this application to be heard Applicant undertook to file an undertaking for the said security for costs which the parties agreed should be estimated at M2,500.00. This amount being available to realize taxed costs of this Application on the ordinary scale.

The granting of an order rescission and costs is in the discretion of the Court the party apply therefor asking for an indulgence. I do not intend to ever go about apportioning blame for the respective conduct of each party more than I have already done and more than to do what is required by the justice of the matter.

I do not agree that there should be costs awarded *de bonis propriis* against Mr. Matabane. I do not think that there is

anything in his conduct that can be called serious or reprehensible therefore for calling for an award of costs of an exemplary nature. I do not agree with the Respondent in that regard.

I make the following further orders: Respondent shall plead, file objection or except and or counter-claim within seven days. In any event he shall plead over. I end up by thanking Counsels for the brief and smooth way they have argued this application.



T. MONAPATHI
JUDGE

For the Applicant : Mr. Matabane

For the Respondent : Miss Mafoso