CIV/APN/495/93

IN THE HIGH COURT OF LESOTHO

In the matter between:-

CEGELEC (LESOTHO) LIMITED — APPLICANT

vs

MAHLOMOLA MOABI — 1ST RESPONDENT
VINCENT MASENYETSE — 2ND RESPONDENT

Before the Honourable Chief Justice B.P. Cullinan

For the Applicant : Mr S. Redelinghuys
For the Respondents : Mrs V. Kotelo

JUDGMENT

Cases referred to :

(1) Topol & Others vs L.S. Group Management Services (Pty) Ltd (1988), SA 639;

(2) Tshabalala & Another vs Peer (1979) 4 SA 27;

(3) De Wet & Others vs Western Bank Ltd (1977) 4 SA 770;

(4) Anlaby vs Practorius (1888) 20 Ch. 764.

This is an application for rescission of a default judgment. The first respondent ("the plaintiff") instituted an action against the applicant company ("the first defendant" or Cegelec, as the case may be) and one Sepotlake Macasi ("the second

defendant"), for damages occasioned by a collision between the first defendant's vehicle, driven by the second defendant, and the plaintiff's vehicle. Neither defendant entered an appearance to the summons. Judgment in default of appearance was duly granted to the plaintiff. After hearing evidence from the plaintiff, as to liability and quantum, the Court gave judgment against the first and second defendants, jointly and severally, in the total amount of M109,149.32, with interest at 18% per annum with effect from the date of issue of the summons, with costs.

The basis of the application for rescission is that, despite the return of the Deputy Sheriff, there was no service of the summons upon either the first or second defendants. The learned Counsel for the plaintiff, Mrs Kotelo, submits *in limine* that the provisions of rule 27 (6) apply. Rule 27, in part, reads as follows:

(3) Whenever the defendant is in default of entry of appearance or is barred from delivery of a plea, the plaintiff may set the action down for application for judgment. When the defendant is in default of entry of appearance no notice to him of the application for judgment shall be necessary but when he is barred from delivery of a plea not less than three days notice shall be given to him of the date of hearing of the application for judgment.

(4) Where a plaintiff has been barred from delivering a declaration, the defendant may set the matter down for application of absolution from the instance. Not less than three days notice shall be given to the plaintiff of the date of hearing of such application.

(5) Whenever the plaintiff applies for judgment against a defendant in terms sub-rule (3) herein, the court may grant judgment without hearing evidence where the claim is for a liquidated debt or a liquidated demand. In the case of any other claim the court shall hear evidence before granting judgment, or may make such order as it seems fit.

(6) (a) Where judgment has been granted against defendant in terms of this rule or where absolution from the instance has been granted to a defendant, the defendant or plaintiff, as the case may be, may within twenty-one days after he has knowledge of such judgement apply to court, on notice to the other party, to set aside such judgment.

(b) The party so applying must furnish security to the satisfaction of the Registrar for the payment to the other party of the costs of the default judgment and of the application for recission of such judgment.

(c) At the hearing of the application the court may refuse to set aside the judgment or may on good cause shown set it aside on such terms including any order as to costs as it thinks fit."

Mrs Kotelo points to the requirement under sub-rule 6 (a) above to file an application for rescission within twenty-one days: in the present case there was a delay of some 90 days. Again no security has been provided as required by sub-rule (6) (b) The learned Attorney for the first defendant, Mr Redelinghuys submits that his client was not "in default of entry of appearance" and that therefore Rule 27 does not apply. He submits that instead the application is brought under rule 45. That rule reads as follows:

"45. (1) The court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent or such ambiguity, error or omission;

(c) an order or judgment granted as a result of a mistake common to the parties.

(2) Any party desiring any relief under this Rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

(4) Nothing in this Rule shall affect the rights of the court to rescind any judgment on any ground on which a judgment may be rescinded at common law."

Mr Redelinghuys submits that rule 45 (1) (a) applies, as due to the fact that his client had not been served, he was not in default of entry of appearance, and the judgment was therefore "erroneously granted in the absence of his client. He refers to the authority of Topol and Others vs L S Group Management Services (Pty) Ltd (1). That case was based on the provisions of rule 42 of the Uniform Rules of the Supreme Court of South Africa, upon which rule our rule 45 is based, and in particular sub-rule (1) (a) thereof, which reads:

"42. (1) The Court may, in addition to any other powers it may have, *mero motu* or upon the application any party affected, rescind or vary:

(a) an order or judgment erroneausly sought or erroneously granted in the absence of any party affected thereby..."

In the Topol (1) case Stafford J. had earlier refused an application for leave to appeal, when the applicant failed to attend the hearing upon notice. Shakenousky A.J. thereafter dealt with an application to rescind the judgment refusing leave to appeal. He observed at p 648 that,

"There can be little doubt that Stafford J. proceeded on the premise that notice had been given and that the applicants, despite having knowledge of the hearing, were in default. In view of my finding that the applicants were not in wilful default I now have to decide whether Stafford J. in granting the judgment, did so 'erroneously' within the meaning of Rule 42 (1) (a)"

Shakenousky A.J. thereafter reviewed the authorities in the matter, which learned review I gratefully adopt. On the basis of such review, he concluded at p650 that the order of Stafford J. "was granted 'erroneously' within the meaning of Rule 42 (1) (a)". Shakenousky A.J. then considered the question whether a

judgment having been granted erroneously, "an applicant need establish, in addition, good cause for rescission". The learned judge relied *inter alia* on the cases of Tshabalala and Another vs Peer (2) & De Wet and Others vs Western Bank Ltd (3), both cases involving a decision of the Full Bench of the Transvaal Provincial Division. In Tshabalala (2) Eloff J (as he then was) in considering rule 42. (1) (a) observed at p30:

> "The Rule accordingly means - so it was contended - that, if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order. I agree that this is so ....."

In the De Wet (3) case the judgment delivered by Melamet J. was upheld in the Appellate Division. In considering rule 42 (1) Melamet J. observed at p 777:

> "As set out above, the Rule enables the Court, in addition to any powers it has, to grant relief to an applicant under the circumstances set out in the Rule. It was contended that the word "may" indicates that the Court has been vested with a discretion and that this should only be exercised in favour of the applicant if good or sufficient cause - eg probability of success in the action - were shown. There is no basis, in may view, to grant such further requirement onto the Rule and it is clear from the

context in which the word is used and the Afrikaans version that the word "may" is used in the sense that the Court is empowered, in certain defined circumstances, to rescind or vary a judgment."

Thereafter in the Topol (1) case Shakenousky J. concluded at p 650 that,

"It is not a requirement for rescission under Rule 42 (1) (a) that an applicant need, in addition, establish good cause for such rescission".

Thereafter the learned Judge at p 651, in view of his finding that rule 42 (1) (a) applied, found it unnecessary to consider the alternative basis for rescission under the common law. Finally, he found that the applicant was entitled to rescission. This, I might add, is also in accord with the practice in England where, if a judgment is irregularly obtained, and so 'erroneously' granted, the applicant is entitled *ex debito justitise* to have it rescinded: see the old authority of Anlaby vs Practorious (4).

As to the present application, if it is the case that the summons was not served, then it could be said that the default judgment was granted erroneously and the provisions of rule 27 (6) would not apply. But even if they do apply I observe that the first and second defendant have put forward a defence on the merits. Secondly, as to the matter of security, Mr Redelinghuys

has informed the Court, though form the Bar, that he spoke to the Registrar in the matter and that she waived such requirement. As to the delay involved, it can only be viewed in the light of all the facts, to which I now turn.

The collision took place between the two vehicles on 8th February, 1993. The summons was issued on 16th March, 1993. A return of service of the summons was filed by the Deputy Sheriff, who is the second respondent to this application, on 26th April, 1993. The matter was set down as an uncontested matter on 2nd August, 1993, for hearing on 9th August, 1993. It was later set down in the Motion Roll on 16th August, 1993, when the default judgment was granted. Ultimately the Deputy Sheriff served a writ of execution on 3rd December, 1993.

Meanwhile in response to a letter written by Cegelec on 18th March, 1993, the plaintiff's Attornies wrote to Cegelec on 19th March, 1993, informing them that the summons had been issued. The acting brach manager of Cegelec, Mr John Lim has, deposed in a founding affidavit that he referred such letter to the company's insurance brokers (Hoskens Insurance Brokers), who assured him that the matter would receive their attention and requested him to furnish them with a copy of the summons when served.

Mr Lim deposed that he received a copy of the default judgment of 20th August on or about 13th September, 1993. On

16th September, at the request of the insurance brokers, he wrote to the Registrar acknowledging receipt of the order on 13th September. He continued,

> "However as mentioned to the Clerk of Court serving the order, we have never received any summons to appear in Court concerning that matter.
>
> The matter has been handed over to our insurance brokers since the beginning and (we) were prepared to defend the case."

The letter concluded with a request, made on 13th September to the person serving the Courts order, to supply Cegelec with a copy of the summons. That letter was copied to Hoskens Insurance Brokers. So also was a further letter, written again by Mr Lim to the Registrar on 6th October, repeating the request for a copy of the summons.

Meanwhile it seems that Hoskens Insurance Brokers had handed over the matter to the insurers themselves, namely IGI Insurance Company (Lesotho) Limited. That company wrote to the plaintiff's Attornies on 2nd September, 1993, simply to say,

> "We refer to your letter dated 19/03/93 and note that summons have already been issued against our client"

On 7th September, the Attornies replied, stating that,

"Judgment has already been entered against your client"

Mr Lim deposes that he presumed after his letter of 6th October, that the insurance company had appointed an Attorney in the matter. Thereafter he was served with a writ of execution by the Deputy Sheriff, again the second respondent, on 3rd December, 1993. Mr Lim declined to accept service until he had received a copy of the summons. The present application for rescission was then launched on 8th December.

Leaving aside the issue of the Deputy Sheriff's return of service for the moment, there is one matter in the evidence which puts me on enquiry. When the insurers, IGI Insurance Company (Lesotho) Limited wrote to the Attornies for the plaintiff on 2nd September, 1993, they referred to "your letter dated 19/03/93". That I presume was a reference to the Attornies' letter of 19th March, addressed to Cegelec. The letter from the insurers, however, contains the item, "Your ref CIV/T/126/93". That of course was the Court file number of the summons issued by the plaintiff. That reference however, oddly enough, was not to be found in the plaintiff's Attornies' letter of 19th March, and the question arises as to how, if Cegelec had not been served with the summons, the insurers' were on 2nd September, familiar with the appropriate Court file number.

One inference which arises of course is that the summons had in fact been properly served. I have not had the advantage of any submissions in the matter, however, as I had not noticed the reference before nor during the hearing, Mrs Kotelo did comment upon the undue delay of some six months reflected in the insurers' letter of 2nd September, 1993, Mr Redelinghuys informed the Court, again from the bar, that meanwhile there had been some correspondence between the parties, which he regretted not having placed before the Court. There is the possibility therefore that the Court file reference number was gleaned from further correspondence, or perhaps even by verbal communication, with the plaintiffs' Attornies or the Court staff. This is all speculation of course, but it serves to illustrate that a number of inferences are possible and, even though I am put on enquiry, I cannot say that, arising from the insurers' knowledge of the Court file number on 2nd September, the probabilities are that Cegelec was served on 26th April.

I turn then to the return of service filed by the Deputy Sheriff. The return indicates that service was effected upon "Manager of Cegelec who is of apparent age of 34 years at New Europa and TY..... upon the respondents themselves I served the said process." Mr Lim deposes that he is the acting branch manager of Cegelec and that,

> "I am the only person that could be described to have been the manager at the alleged time of service of the summons.

The summons was definitely not served on me nor was it left at the offices of the applicant in any of the other ways of service as provided for in terms of the rules of Court".

Rule 4 (1) (d) of course provides that "service shall be effected by delivering a copy of the process to some responsible employee at the registered office or principal place of business of (the) company". The return however claims that service was effected upon the "Manager" rather than an employee. In this respect there is a supporting affidavit from David Thabiso Ramokhele employed by Cegelec as a driver and assistant to the ıch manager since 1988. His affidavit in part reads:

"I confirm that I interviewed the Deputy Sheriff, the second respondent herein, on 3rd December, 1993 and confronted him about the allegation that summons was served on the applicant.

I know the second respondent personally and asked him to identify the person upon whom he served the summons and whom he claimed was the manager of the applicant. He could not give me any explanation and when Mr Lim arrived I asked him whether this (Mr Lim) was the person. He answered in the negative.

The position is that Mr Lim joined the applicant as site agent during about July 1990 and with effect from about July 1993 acted as branch manager. Since about beginning of April, 1993 there was no manager as such and Mr Lim attended to the management affairs as well as being site agent.

I have made further investigations at our offices and interviewed all staff to establish if anyone has received the summons in question. It become clear that the summons was in fact not served at our offices at all."

Mr Lim in his affidavit confirms that the second respondent admitted that he had not served him (Mr Lim) and that he could not indicate the person whom he had served. As to the second defendant, Sepotlake Mocasi, he has also filed an affidavit denying service. He deposes

"I deny that the summons in this matter was served on me. My home is at Hangersdrift where my wife and children live. I am well known in that area as I was born there and I have lived there for a long time.

I have seen copy of the return of service in terms of which the second respondent alleges to have served a copy of the summons at TY on me personally. This is not true"

Mr Lim deposes that Hangersdrift is some 15 kilometres away from the centre of Maseru just part Lancers' Gap. I observe that the second respondent claimed a travelling allowance of M16 in respect of a return journey to Teyateyaneng, a total of 80 kilometres, at 20 cents per kilometres, even though the address of the second defendant was stated in the summons to be "Hangersdrift, Berea in the district of Berea." Mr Lim deposes that the journey claimed "is impossible and simply not true."

A further supporting affidavit is filed by one Thabiso Samuel Monyatsi, a clerk in the offices of Cegelec's Attornies. He deposes that he inspected the Court file in the matter and observed no signatures thereon of any respresentative of Cegelec nor of the second defendant. This of course is not conclusive, in the sence that the Deputy Sheriff is not obliged to obtain the signature of any party served - but is merely obliged to serve a copy of the process upon him. Nevertheless, it is the practice to obtain the signature of the party served upon the original summons, and the absence of signatures in the present case but adds to the weight of evidence pointing to non-service.

For my part, I confess that the return of service previously passed my scrutiny in the pressures of a Motion Roll. I observe however that whereas the return was date- stamped by the Assistant Registrar on 26th April, 1993, it bears no other date thereon. The Deputy Sheriff did not indicate the date on which he signed the form. More importantly, he did not indicate the

respective date on which he served each of two defendants, whose respective registered office and residence were at some distance.

Neither again did he state the particular premises - registered office, place of business of business or residence etc - where he had effected service.

In answer to all this, the plaintiff has contented himself with hearsay allegations in his opposing affidavit. No opposing affidavit has been filed by the Deputy Sheriff. Mrs Kotelo submits that the applicant should have called viva voce evidence, but I ask on what basis? That only arises where there are issues of credibility in the affidavits before the Court, which the Court considers can only be resolved by such evidence. In the present case, the plaintiff's hearsay allegations are simply inadmissible. There is no provision in Lesotho equating to that contained in section 36 (2) of the Supreme Court Act (No 59 of 1959) of South Africa, whereby,

> "The return of the Sheriff or a deputy - sheriff or his assistant of what has been done upon any process of the court, shall be *prima facie* evidence of the matters stated therein."

The return before me does not constitute *prima facie evidence* as such. Even if it did, it would not be conclusive, but could be rebutted by evidence to the contrary. As matters stand, the

unsworn document, which has not even been dated by the second respondent, has been rebutted by a succession of affidavits. The second respondent has chosen not to swear an affidavit in response and it can only be said that the applicant company has discharged the onus upon it, on a balance of probabalities. I find therefore that the summons was not served upon either the first defendant nor the second defendant.

Mrs Kotelo submits that extreme delay was involved and seemingly suggests that once a defendant is aware that a summons has been issued against him, it is his duty to obtain a copy of the summons. I know of no authority for such proposition. The very contents of a summons (see rule 18 and Form "N" in the First Schedule to the High Court Rules) indicate the necessity of service upon the defendant. A debtor must seek out his creditor, but no such relationship is established by the mere issue of a summons, and in the matter of subjecting a defendant to the process of the Court, it is the plaintiff who must seek out the defendant. I conclude therefore that the default judgment was erroneously granted.

That being the case, the application falls under rule 47 and I can see no necessity therefore for the applicant to establish good cause. In the matter of the delay, of some three months, in applying to rescind the judgment, bearing in mind that the matter was complicated by the fact that first insurance brokers and then insurers themselves dealt with the matter, and bearing

in mind Mr Lim's efforts to secure a copy of the summons from the High Court, I do not see that the delay involved was unconscionable. In any event, even if the application fell under rule 27 (6) I would in the interests of justice, condone such delay.

One final matter, as the judgment was granted jointly and severally, I would have expected the second defendant to have joined as second applicant to this application. The evidence given by the plaintiff in, support of his declaration, was that the second defendant acted in the scope of his employment as a driver by the first defendant. Under the circumstances it would be quite unrealistic and inequitable to exclude the second defendant from the Court's order. In all the circumstances, therefore, I rescind the default judgment, granted against the first and second defendant jointly and severally in the proceedings CIV/T/126/93 on 16th August, 1993, and I set aside the writ of execution issued under the hand of the Registrar on 26th October, 1993 pursuant to the said default judgment.

As I see it, if the plaintiff wishes to pursue his claim, the proceedings will have to commence *de novo* : even had the summons been served upon the defendants, it did not accord with rule 18 or the scheduled Form "N", and objection can still be made thereto.

As to costs, this is not an application under rule 27 (6) where the summons had been properly served and the defendant had been guilty of delay in entering appearance. As Shakenousky A.J. observed in the Topol (1) case at p 651, the applicant "is not, in the nature of things, seeking an indulgence." As the default judgment was granted erroneously, he was entitled *ex debito justitiac* to the rescission thereof. That being the case, I cannot see why the normal rule should not apply, namely that the cost should follow the event. I grant costs to the applicant.

Dated this 28th Day of April, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE