IN THE HIGH COURT OF LESOTHO

In the matter between:

SECURITY LESOTHO

VS

MOLIKOE MOFO

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 23rd day of October 2000

On the 22nd September 2000, appellant's appeal together with the application for condonation was dismissed with costs. The appeal was dismissed specifically for lack of prosecutions. Reasons were to be filed on the 23rd October 2000.

These are the reasons:

The court was supposed to hear an appeal from the magistrate's court against the magistrate's refusal to rescind A default judgment. It turned out that the issue was no more the appeal against the magistrate's judgment alone, but

rather an application for dismissal of the appeal because of lack of prosecution. Proceeding with the appeal (which could take place after an application for reinstatement of a lapsed appeal) was seen as an abuse of the court process.

Appellant had failed to respond to respondent's summons timeously, and this (in terms of the Rules of Court) resulted in a default judgment in respondent's favour. An application for rescission of judgment followed. It failed, but an appeal against the magistrate's judgment dismissing an appeal was made 25 days late. Application for condonation of late noting of appeal was made in this court. This application for condonation was granted more than a year later and appellant was given leave to appeal. The appeal was immediately filed but not prosecuted. A year later, respondent (not the appellant) set the appeal down for dismissal.

Prospects of success in an appeal against refusal of rescission

In terms of Rule 1(1) of *Order No. XXVIII*of the *Subordinate Court Rules*, defendant was entitled to apply for rescission of judgment "within one month after sch judgment has come to the knowledge" of defendant. The appellant who was the defendant in its affidavit supporting the application for rescission of judgment stated that he had first come to know of the judgment on the 17th November, 1996. The writ had been issued on the 15th November, 2000. The default judgment had been granted on the 18th September, 1996, while summons had been issued on the 30th July, 1996, or thereabout.

There was no dispute that the summons had been received by appellant on the 15th August, 1996, at 8.30 a.m., but no action had been taken. Therefore

after more than thirty-three days respondent who is the plaintiff who is now the respondent, obtained a judgment by default. Pursuant to a write of execution, a vehicle of respondent was attached and removed from defendant's place of business.

There is also no dispute that on the 21st June, 1996, an identical action had been brought in the High Court and that defendant had entered appearance to defend and objected to the institution of the action in the High Court, because it was a matter within the jurisdiction of the Magistrate's Court. Plaintiff then withdrew that action and brought it in the Magistrate's Court. It is this Magistrate's Court action whose summons never got to the defendant's management, although it had been properly served. Consequently plaintiff was entitled to take judgment by default in the manner he did.

In the affidavit in support of an application for rescission of judgment, defendant who is now appellant says the summons from the Magistrate's Court were served on the 15th August, 1996, on a security officer who did not refer them to management after signing for them. Management of defendant only knew of the Magistrate's Court action when a writ of execution was issued and defendant's property was being seized. This is not disputed. Nor can it be disputed that defendant was at fault in not defending the action. This is a common problem in offices and companies. Papers served on junior officers from time to time do not reach management.

The defendant had a defence based on the contract between parties. A

rather one sided contract, but a contract, nevertheless. Indeed paragraph 3 of plaintiff's answering affidavit does not deny awareness of the indemnity clause. It could not be said there was no *bona fide* defence to the plaintiff's claim.

Rule 2(1) of *Order No. XXVIII* of the *Subordinate Court Rules* provides:

> "The court may on the hearing of any such application, unless it is provided that applicant was in wilful default, and if good cause is shown, rescind or vary the judgment in question...."

Granting a default judgment violates the principle of *audi alteram* partem, consequently courts grant default judgment to meet other ends of justice, such as justice delayed is justice denied, not to deny one of the parties a hearing. "As a general rule, if wilful default is not shown, and the court has reason to think that there might be a defence, the application should be granted."—Jones & Buckle *The Practice of Magistrate Courts in South Africa* 6th Edition at page 678. In *De Witt's Auto Body Repairs (Pty) Ltd. v Fedgen Insurance Co.* 1994 (4) SA 705 at 711 EF Jones J put the issue as follows:

> "An application for rescission is never simply an enquiry whether or not to penalise a party for the failure to follow the rules and procedure laid down for civil proceedings in our courts."

There is more that is involved because as granting a default judgment is a drastic step:

> "Magistrates should not refuse to reopen where there is doubt as to

> whether the default has been otherwise than wilful; they should lean rather towards reopening than towards refusing. See *Du Plessis v Tager* 1953(2) SA 275 (as translated by Jones & buckle *The Practice of Magistrate Courts in South Africa* 6th Edition at page 678).

The onus of disproving that the default was wilful is on the respondent. All applicant has to do is to set forth reasons for his non appearance. That is why in Rule 2(1)of *Order XXVIII* of the *Subordinate Court Rules* the words "unless it is proved" have been inserted. To give a history of the insertion of these words in this Rule. Jones & Buckle *The Practice of the Magistrates' Courts in South Africa* 6th Edition at page 678 say:

> "Whereas under previous rules the burden was on the applicant to prove that he 'was by reasonable cause prevented from attending' this sub-rule now casts the burden of proving wilful default on the respondent."

It was for this reason that Peete J condoned the late noting of appeal by appellant. There were prospects of success because the magistrate on the papers appeared to have erred in refusing to grant appellant a rescission of judgment. Realising the urgency of the matter Peete J on the 11th May 2000 made the following order:

> "It is ordered:
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> 1. That condonation be and is hereby granted to Appellant for the late filing of the Notice of Appeal;
> 2. The Appellant shall file a Notice of Appeal;
> 3. The Appellant shall file the record of Appeal within 7 days.

4. The Appellant shall pay the costs of this application."

The record of appeal before me shows that appellant filed the reasons of appeal on the 12th May 1999 which was the day after Peete J had made his order.

Effect of failure to prosecute appellant's appeal

I have already shown that Peete J had ensured that the appeal was heard as soon as possible. The record of appeal was filed on the 20th May 2000. The record of appeal was filed two days later than the time Peete J had laid down. After that appellant did not prosecute the appeal.

On the day of hearing appellant proceeded to argue the appeal as if nothing had happened and demonstrated to the court's satisfaction as Peete J must have found that a rescission of judgment should have been granted. Appellant ignored its failure to conform with the rules.

When respondent addressed the court and defended the Magistrate's judgment, the court drew the attention of the respondent to the principles and the rules that govern rescission of judgment. This the magistrate had overlooked. The sole issue became one of appellant's dilatoriness and failure to conform with the rules and ultimately the failure to prosecute its appeal. It was at that stage that appellant applied for condonation of its failures.

It will be observed that as this appeal had lapsed in July 1999 in terms of Rule 52(1)(d) the onus of reinstating the appeal was on the appellant. This he

could only succeed in doing by showing good cause. Respondent should have just issued a writ of execution. Appellant would have been obliged for the second time to seek the court's indulgence to stop a lawful execution of judgment.

The other problem which appellant also had was that it did not give respondents prior notice of the application for condonation of failure to comply with the rules. This application was being made (as facts turned out to be) solely to defeat respondent's application for dismissal of appellant's appeal, because respondent had proved appellant was in breach of Rule 52(1) of the *High Court Rules* 1980. These rules provide that an appeal should be set-down within four weeks. On this occasion, there was no excuse for not doing so. Peete J had in fact directed that the record of the appeal should be filed of record within seven days. It had been filed within nine days — a delay of two days. From the 20th May 1999 there was no excuse for not setting the matter down. The maximum period of sixty days elapsed without any attempt to set the matter down.

It is a notorious fact that Rule 52 provides a lot of problems because records for appeals to the High Court cannot be prepared timeously in many cases, especially those from the Judicial Commissioner's Court. Even so where records of proceedings should have been ready timeously, this court is obliged to take a dim view of delays. It seems to me that both before this court and the Court of Appeal, the case of *Motlalentoa v Monyane* (1985 - 89) *Lesotho Appeal Cases* 244 was not decided on a complete reference to Rule 52 of the *High Court Rules* 1980. It was a Judicial Commissioner's Court appeal yet it was decided under Rule 51(1) exclusively when it should have been governed by Rule 52(5).

It was by mistake brought and treated as a Rule 52(1) case, had the proper rule been applied the outcome in *Motlalentoa v Monyane* should have been different. This oversight was not spotted unfortunately. Rule 52 itself gives the court extensive discretionary powers of condonation. This fact should not be overlooked.

Rule 59 of the *High Court Rules* 1980 further gives this court residual power to condone breaches of rules in exceptional cases "if it considers it to be in the interests of justice". A very good case must be made. It is not enough to say a practice has grown because of which rules of court are disregarded. In *Motlalentoa v Monyane* 1985 *Lesotho Appeal Cases* (1985-89) 244 (these cases are compiled by K.A. Maope) at page 245 Mahomed JA at page 245 found as a fact that:

> "There were weighty grounds in support of the conclusion arrived at by the court *a quo*. The provisions of Rule 52(1) are clear and peremptory: they have been in existence for 7 years; the appellant and her husband have at all relevant times represented by experienced counsel; the notice of motion contained no prayer for condonation; the application for condonation was not made by the prospective appellant from the judgment of the Judicial Commissioner, but by his wife, and no facts have been averred in the affidavits relevant to the existence of the practice referred to, the *bona fides* of the appellant and the balance of convenience."

I have already said that counsel on both sides were not aware that the *Motlalentoa v Monyane* case was governed by Rule 52(5) and that appellant in that case was probably not at fault. Nevertheless the principles Mahomed JA applied govern

applications for condonation of rules of court generally. In other words if a properly motivated application had been made and the special facts that could move the court to condone a delay had been alleged, the court might condoned a failure to comply with this rule. In so doing, the court has to be alive to the fact that it should not make compliance with the rules optional. The court should always bear in mind that time limits set in the rules are intended to speed up the judicial process so that justice is not denied through delays. Even the existence of a practice that does not strictly comply with the rules must be clearly spelt out and justified in the special circumstances of the case.

It should be borne in mind at all times that the court uses its coercive powers to speed up litigation and grants default judgments where rules are not being adhered to. This power exists because delays in litigation can become denials of justice. As Atkin LJ said in *Evans v Bartlam* [1937] AC 473 at 480:-

> "The principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power...."

In other words for good cause, it can be persuaded to rescind its judgment so that both sides can be heard. If there is an application for indulgence after another, and the party continues to being default for one reason or another, the court might feel there is an abuse of court process by using legitimate court procedures to delay or subvert the course of justice. When a court feels this way it will refuse to condone defaults.

In this case, the urgency and the speeding up of the hearing of this appeal that Peete J had ordered was ignored. There had been a condonation of a delay caused by appellant already. Applicant should have been aware of the fact that delays are prejudicial to it and to respondent. Applicant was also aware that proceedings were instituted in August 1996. Four years had elapsed before a rescission of a judgment had taken place. Witnesses of both sides including its employees might not available in the distant future if this delay became further protracted. It was as if appellant did not want the court ever to go into the merits of the dispute between the parties. To put what I mean in the words of Jones J in *De Witt's Auto body Repairs (Pty) Ltd v Fegen Insurance Co.* 1994(4) SA 705 at 711:-

> "The question is, rather, whether or not the explanation for default and any accompanying conduct by the defaulter, be it wilful, negligent or otherwise, gives rise to the probable inference that there is no *bona fide* defence, and hence that the application for rescission is not *bona fide*."

Listening to appellant's counsel, I came to the conclusion that she had run out of explanations or justifications for appellant's default. Applicant's counsel was allowed to canvass matters outside the record. She looked for an invitation to respondent to set the matter down, in appellant's file. This invitation was allegedly made in November 1999 inviting respondent before the registrar to obtain a date of hearing. It turned out that the document (if it existed at all) was a typed, unsigned and undated paper. It had not been dispatched to respondent or acted upon. Eventually on the 22nd May 2000 (more than a year and two days after the record of appeal had been transmitted to this court) respondent set the

appeal down in order to have it dismissed.

What is expected of me and the magistrate (because an appeal is a rehearing of this rescission application) was put by Jones J as follows:

> "The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in *Grant v Plumbers (Pty) Ltd*...and also any prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice." *(De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co. Ltd* at 711 GH)

While it might have been too early for the magistrate to make the conclusion that appellant was only playing for time, I am labouring under no such a disadvantage. I am satisfied that appellant is not interested in the hearing of the merits of this case. If appellant is, the conduct displayed is dilatory, negligent and highly prejudicial to respondent. A court of justice is obliged to put a stop to this conduct once and for all. Peete J tried to make appellant to get this matter heard expeditiously by condoning appellant's delay on condition that appellant speeded up the hearing of this appeal, but this did not help. I do not think this court ought to be indulgent any further towards appellant, respondent has to be considered too.

What has happened in this case is that two months within which the respondent might have set the appeal for hearing in terms of Rule 52(1)(c) had also elapsed. Consequently in terms of Rule 52(1)(d)

> "If neither party applies for a date of hearing as aforesaid the appeal shall be deemed to have lapsed unless the court on application by the appellant and an good cause shown shall otherwise order."

The ideal and correct procedure was for respondent to have issued a warrant of execution because there was no more any appeal. It had lapsed for lack of prosecution. Then appellant would have ben forced to apply for the reinstatement of the appeal. Respondent would then have opposed the application for reinstatement. That would have been the end of the appeal if the court refused to reinstate it because of appellant's aforementioned conduct. There really is no meaningful difference. What applicant did was to set the matter down although it had lapsed. The purpose was to ensure that the court takes a final decision that this appeal has lapsed and is definitely disposed of for lack of prosecution. It was at that stage that appellant made a verbal application for reinstatement if the court had been persuaded that there is good reason for doing so, it might have reinstated the appeal. It refused appellant's application.

My order was consequently the following:

> "Application and appeal dismissed with costs for lack of prosecution. Reasons will be filed on the 23rd October 2000".

The aforegoing are therefore reasons for my order.

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WCM MAQUTU
JUDGE