CIV/APN/285/2000
IN THE HIGH COURT OF LESOTHO

In the matter between:

HLALEFANG TAASO	APPLICANT
and	
MOTLATSI MAKHOTHE	1st RESPONDENT
HER WORSHIP MRS POLAKI (MASERU MAGISTRATE'S COURT)	2nd RESPONDENT
THE CLERK OF COURT (MASERU MAGISTRATE'S COURT)	3rd RESPONDENT
ATTORNEY-GENERAL	4th RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 21st day of August 2000

This matter came before this Court by way of review of judgment of the Second Respondent herein. The decision had been in an application for rescission of judgment in case number CC 789/99 of the Maseru Magistrates Court in which the Applicant therein was the present Applicant. To avoid confusion I called the present Applicant Defendant and the First Respondent Plaintiff as the need arose.

This Court had an advantage on hearing of the Court file of the Court a quo reasons for decision by Second Respondent which followed this Court's Order for despatch of such record. The application before the Court a quo had been opposed.

The important events of the application before the Court a quo were that the application for rescission had had to be set down for hearing on the 14th February 2000. Mr. Phakisi told this Court that he had at all material times been aware that the requirement for filing of security by the Applicant had been present in terms of Rule 46(3) of the Subordinate Court Rules Legal Notice No. 132 of 1996. The sub-rule reads in full as follows:

"(3) save where leave has been given to defend as a pro deo litigant in terms of Rule 50, no such application shall be set down for hearing until the applicant has paid into Court or has secured to the satisfaction of the plaintiff, to abide the directions of the Court the amount of the costs awarded against him under such judgment and also the sum of M40 as security for the costs of the application. Provided that the judgment creditor may, by consent in writing lodged with the Clerk of the Court waive compliance with this requirement. (My underlining) I will come back later to a few aspects of the separate provisions of the rule.

Mr. Phakisi who was Defendant's Counsel, in the Court a quo, confirmed that on the 2nd day of February 2000 there was a telephone conversation with Plaintiff's Counsel regarding the setting down of the application for rescission for argument. Following the conversation, the Plaintiff's Counsel wrote a letter to Defendant's Counsel requesting the latter to verify

whether the date agreed upon between themselves, in a telephone conversation, had been obtained. The letter was

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attached to the founding affidavit to the present application and was marked "HT1".
I noted further that it had been unclear in the above telephone conversation nor in the letter "HT 1" whether it was the Plaintiff or the Defendant who caused the matter to be set down. I thought this was of paramount importance in seeking from the onset to unlock the vexed question of whether or not there had been waiver of payment of security as the Applicant contended that there had been. For some unknown reason Mr. Phakisi refused to come out clearly as to who caused the setting down of the application in the Court a quo. I inclined to the probability that it was the Plaintiff who caused the setting down notwithstanding the equivocal: "Both parties came together before the Clerk of Court and agreed to set down the matter for the 14th February 2000." For if it was in the High Court a notice in terms of Rule 39(2) would have indicated as to who had caused the matter to be set down. The question as to who sets down the matter would feature later concerning to question of waiver. But not because it would impact in any way in the reasons for my decision.

Concerning this alleged waiver of security it is however interesting how the Applicant introduced that question in his affidavit in the following paragraphs thus:

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I am advised by my Attorneys of record that before a matter of rescission of judgment can be set down for hearing the Applicant therein has to file security for costs in terms of Rule 46(3) of the Subordinate Court Rules 1996.

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As I was the Applicant in CC 789/99 in a matter for rescission of judgment, I am informed by my Attorneys of record, the information

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I believe to be true and correct, that the matter could not be set down for hearing before I filed for costs, or the Respondent had waived compliance with this requirement in terms of Rule 46(3) of the Subordinate Court Rules 1996." (My underlining)

Before I come to the events of the 14th February 2000 I needed to record the prayers in the application before the Court a quo. This was because of the weight I would end up attaching to prayer (c) of the notice of application. Of value in it was precisely that the prayer (Mr. Phakisi later argued) contained an application for condonation. This the learned magistrate did address but not as broadly as one would have wished. The notice of application read in part:

1) "That a Rule nisi be issued and made returnable on a date to be determined by the above Honourable Court calling upon the Respondent to show cause if any, why:

a) .....
b) .....

c) .....
d) Applicant shall not be ordered to pay security for costs.
e) .....
f) .....

Mr. Phakisi contended quite correctly that the prayer (d) above was in the nature of applying for condonation. It may have been inelegantly drawn. This was in addition to the argument that was very vociferous that the Plaintiff should have been held to have waived payment for security, which he could do, as provided in Rule 46(3). I was keen to find out from the Defendant's affidavit how he could have motivated the above prayer. I did not however find anything in that direction.

Back to the events of the application for rescission of judgment as shown in

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the Applicant's affidavit in the instant application. And more particularly to paragraph 13 onwards. On the 14th day of February 2000 Defendant's legal representative appeared before the Second Respondent to move the application for rescission. The application was however dismissed with costs on the basis that Defendant had not filed security for costs. The learned magistrate did not go into the merits of the application. The Applicant made a submission couched in following words as in paragraph 14:

> "I aver that this was irregular inasmuch as the dismissal was not in accordance with Rule 46(3) of the Subordinate Court Rules 1996, regard being had to the fact that Respondent through his legal representative, had waived compliance thereof by taking part in the setting down of the matter for hearing. To set a matter down for hearing is a matter for the two parties and not the Applicant alone."

From above it becomes easy to observe on obvious contradiction. It is that if the Defendant has opined that there had been waiver already in existence by reason of the matter being set down for hearing why would he (in argument) insist on his prayer for condonation of the filing of security? But there it was. It does seem and I was inclined for the view that that (condonation) appeared to be what the Defendant really sought.

The Defendant ended up by arguing for that the Court a quo should not have dismissed the application but should have directed the Defendant to pay security for costs by virtue of the power vested in that Court by Rule 56 of the Subordinate Court Rules 1996. Mr. Phakisi specifically referred to Rule 56(1). The sub rule reads thus:

> "56 (1) Except where otherwise provided in these Rules failure to comply with these Rules or with any request made in pursuance thereof shall not be a ground for giving of

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> judgment against the party in default."

The rule suggests in its proper interpretation in my view a simple solution and a guide to the Court in a situation in which a Court was being apprised of failure to comply with a rule. It

ought to resort to the easiest of steps which in my reckoning were made "in the interest of justice or fair play." What it should have done was to give directions to the defaulting party to comply with the rule transgressed within a certain time, failing which the Court would take action or make any order which it would have made except for the intervening directions which it had given. It is some kind of a circumscribed discretion. This much is suggested in the sub-rules 56(2) and (3). It meant therefore that the learned magistrate should not have immediately dismissed the application without giving Defendant the opportunity to provide the required security.

Before going back to the application of Rule 46(3) to the extend that the Applicant sought to rely on it, it is beneficial to look at the reasoning of the learned magistrate against the background of what has been said hereinbefore. I found that a point-in-limine was raised by Miss Mahabeer for the Plaintiff that the application be dismissed for lack of security. The Court correctly noted that the Defendant had asked for condonation for filing of the security. The Court felt that the requirement was peremptory and gave the Defendant no choice. The Court said Rule 56 could not apply to the case. In that regard it referred to MASILONYANE v 'MATHABANG MALEKE C of A (CIV) 16 of 1983 (full citation not provided) in which it was suggested that the non-payment of security was fatal to the application itself. The learned magistrate also applied the South African case of ADJOODA v MARIO TRANSPORT 1976(3) SA 394 at 379. The case dealt (as far as was relevant) with the time at which security for costs may be furnished. That is why Marais J said at page 39B-C:

> "It is true that the normal practice would be to furnish security at the
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> onset of the proceedings, but here it was done prior to the final stage of the application that is before an order was asked of the Court and in my interpretation of the law it is clear that it was done at a proper stage in time there is no substance in the contention that security should have been furnished much earlier."

The Court also referred in that regard to MATSIE MATSABA v LESOTHO BANK (again full citation not provided) But in the instant matter we face a situation in which no security had been paid at all in and the Defendant had obviously asked for condonation "not to file that security." This was, in addition against the background of the circumscribed discretion (in terms of Sub-Rules 56(2) and (3) which one does not find in the High Court Rules. With the latter practice it just has to be a judicial discretion which is by its nature broad and unregulated.

The learned magistrate found that she was bound by that decision of the Court of Appeal that the application was improperly before Court. This she felt dictated that the application should be dismissed with costs. She said furthermore the Subordinate Court was a creature of statute which did not enjoy any inherent jurisdiction. This was why Rule 46 had to have an interpretation which resulted in the meaning and effect of immutability. The learned magistrate may, in my view, have been unaware of Rule 56 which she should have applied or distinguished. This would be more so in view of the application for condonation by the Defendant which required a separate treatment, on its own.

The above would even be consistent with Mr. Phakisi's submission (as the magistrate did note) that the point-in-limine about non-payment of security was not a proper technical approach. A proper one was a reply or answer to the prayer (d) of the Defendant as it had

touched on the same thing i.e. paying of security. The learned magistrate agreed at the end of page 2 of her ruling. It transpired that the

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Plaintiff had in turn answered accordingly by insisting on the provision of Rule 46 as she submitted that payment of security was mandatory and that non payment was fatal to the application.

The learned magistrate proceeded on pages 3 and 4 of her ruling to reason in a way to effectively say that the provisions of Rule 46 were mandatory, that there had been no waiver and that the decisions of the High Court had to be followed. I supposed that must have been in reference to the provisions of High Court Rules.

I now go back to the provisions of Rule 46(3). I grappled with the difficulty of the interpretation of how an application could not be "set down" for hearing before payment of security. It was that interpretation in the sub-rule which was that the matter could not be placed before a magistrate by either party at all where security has not been paid. I disagreed with that interpretation, with respect. I understood and accepted an interpretation that said that a matter could be set down by either party but the presiding officer would not hear the substantive matter, the merits, and the subject of the application for rescission itself. This is the interpretation that made sense to me. This therefore defeats the logic that the matter will not be set down and once it has been set down there has been waiver.

I repeat by way of emphasis that, I disagreed with Mr. Phakisi who suggested that once a matter has been set down by either party and the Clerk of Court that amounted to waiver of compliance with the requirement to pay security which is envisaged in the proviso to the sub rule 46(3). It cannot be so. I go further to say that it should not be for either parties or Clerk of Court to be afraid of setting down a matter lest he be held to have waived payment of security. This I say bearing in mind the power of a plaintiff or applicant as dominis litis. But the other party could as well set down a matter so that it is finalized without necessarily

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having any intention to waive the requirement for payment of security. In the same vein it is the presiding officer who will decide, once a matter is before him or her, whether security ought to have been paid. But for all intents and purposes he or she decides so because the matter is before him or her having been set down.

I now come to the other part of the proviso to Sub-rule 46(3) following on the above discussion. It is about the matter of waiver of compliance with the requirement "of consent in writing." I am satisfied therefore that the meaning of "by consent in writing lodged with the Clerk of Court" cannot be given any other meaning other than a literal one. I am in no doubt that it has to be a specific, direct and unambiguous direction or communication to the Clerk of Court that contains such consent. It cannot be implied that because one party has set down the matter with another and the Clerk of Court that amounts to a waiver to pay security. This would present serious difficulties against the need to bring proceedings to finality.

I agreed with Mr. Phakisi that in situations such as where an application for condonation was being made the learned magistrate is enjoined not only to accept or reject the application. In

the event that it is rejected the learned magistrate ought to go further. Applicant ought to have been ordered to do that thing which he had asked to be overlooked. In this case as I concluded Defendant ought to have been ordered to pay security and only in the event of failure to do so would the Court dismiss the application without hearing the merits.

For clarity the question which arises would be what power would the magistrate have as a basis for exercising the discretion where a provision is a rule has not been complied with. It was easy for the magistrate to have gone around the problem. She had to read the Sub-Rule 46(3) with Sub-Rule 56(1) (2) and (3). This meant that the Defendant ought to have been ordered or directed to pay security

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within a certain time on the penalty of dismissal of the application. The only question that would remain was that of costs in the meantime. The defendant ought to pay these costs of the day as is clearly envisaged in Rule 56(3).

It was clear in the circumstances that this application ought to succeed and I made the following Orders:

a) That the order for stay of execution was re-instated.
b) The Defendant was ordered to pay security for costs within 7 days from the 21st August 2000 failing which the application will be dismissed.
c) A date of hearing be appointed within 7 days after payment of security.
d) No costs were awarded in this application since there was no opposition filed.

T. MONAPATHI
JUDGE