CIV/T/163/93

IN THE HIGH COURT OF LESOTHO

In the matter between:

SYSTEM ARCH (PTY) LIMITED — Plaintiff

and

SOPHIA LEKHANYA — 1st Defendant
PALESA LEKHANYA — 2nd Defendant
CHRISTOPHER LEKHANYA — 3rd Defendant

For Applicants/Defendants : Mr. M.T. Matsau

For Respondent/Plaintiff : Mr. K. Mohau

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi
on the 28th day of February 2000

I thought justice needed that the application be heard late in the afternoon despite hushed pleas for a postponement and a demonstrated reluctance on both Counsel to have filed heads of argument. My concern was for the litigants. I was

serious when I postponed the case to the earliest convenient date.

This application was filed on the 28th April 1999. It was for stay of execution of default judgment, the setting aside of that default judgment and related relief as shown in prayers 1(c) and (d) of the notice of motion. It became opposed with an opposing affidavit deposed to by Mr. Molomo Mohale a director of the Plaintiff. No replying affidavit was filed. The application came almost five (5) years after the disputed service.

I was told, during argument, that the requirements of a successful application of this kind are: Firstly, that the enability or failure to enter appearance must not have been wilful. There must have been a just or reasonable cause for failure to enter appearance. And furthermore that the Defendant must have a *bona fide* defence to the claim against him or her. There must not have been a delay in applying for rescission and thereby indicating an intention solely to delay the Plaintiff in realizing the fruits of his judgment. Finally that these requirements must all go together. This would be so if the circumstances were those under Rule 27 or the application was sought to be made under that rule. See comments in DOTI STORE v HERSCHEL FOODS PTY LTD 1982-84 LLR 338 and LOTI BRICK (PTY) LTD v MPHOPU AND ORS 1991-1995 LLR 446 This was therefore not quite accurate where the application seemed to be made under Rule 45.

The founding affidavit of the First Defendant showed that the three Defendants were directors and shareholders of a company called Sophia Enterprises Services (Proprietary) Ltd. (Sophia Company) registered on the 22nd February 1991. Its memorandum and articles of association were annexed as "SL2" to the affidavit. All the directors were shown to be of the same postal address of P. O. Box 209, Thaba Tseka.

The First Defendant described herself as employed as a manager at a petrol filling station at Thaba-Tseka owned by Sophia Company. The Plaintiff is deponent has answered this to say that the person he found at the filling station represented herself as Palesa Lekhanya (Second Defendant). First Defendant had been advised by her husband that the Deputy Sheriff had on or about the 20th April 1999 served a writ of execution at their residence in Maseru. In that writ she was cited as First Defendant. It was in respect of a certain judgment which was obtained by default against "the Defendants" on the 2nd August 1993.

It was common cause, inasmuch as "SL1" (Deputy Sheriff's return) showed, that on the 29th April 1993 summons was served only on the Second Defendant. It stated further that the Deputy Sheriff has failed to find the other Defendants. In this regard I noted the following points were sought to be made by the other Defendants: That the return did not show where in particular the Second Defendant was served. Secondly that it was not being said that the other Defendants were inmates or members of the household of the Second Defendant. It was submitted that it could not be accurate in fact or in law that the Plaintiff should say:

> "I aver that is absolutely beyond belief that the Second Defendant could keep service of the summons all to herself for so may years. I aver that service of the summons upon the Second Defendant was in the circumstances valid service even against the other Defendants."

It was contended that no such inference was supportable and no principle allowed for such a presumption. In addition it was contended, against what was sought to be presumed above, that the dearth of further information from the return of service made things even more unhelpful. I would easily find that the Defendant

had a good explanation for her failure to defend.

That the Deputy Sheriff's return did not show the place of service made it easier for the First Defendant to have said she did not know of the summons and at that date of service she was far away in Thaba-Tseka. She added that the Second Defendant never gave him a copy of the summons as a result she never became aware of the same. In this she was supported by the affidavit of the Second Defendant. For these reasons she said she was not in wilful default of entry of appearance to defend the execution. She furthermore added the submission that she had a *bona fide* defence to the action in that she had never commanded the Plaintiff to do any design.

The Third Defendant said he was advised by his father that on or about the 20th April 1992 a deputy Sheriff of this Court had gone to execute a writ against them at his parental home at Ha Mabote, Maseru. That Defendant was advised by his attorneys of record that it appeared that there on the Deputy Sheriff's return of service the summons was served on the 2nd Defendant on the 29th April 1993. The summons had shown his address as c/o Messrs T. Hlaoli & Co. Nkhatho Building, Maseru. The reason for this was not known to the Defendant. Neither did he understand why the summons was not served at that address. He was consequently not informed of the summons.

At that time of the alleged service the Third Defendant said he was attending school in Bloemfontein where he was lodging. This would support a finding that there was a reasonable explanation for this Defendant's failure to have entered appearance to defend. I would cite the same reasons, concerning the Deputy Sheriff's failure to state necessary aspects of his service, in favour of this Defendant.

In a similar manner he submitted that he had a *bona fide* defence to the Plaintiff's action in that he had never personally and I or through his agent instructed the Plaintiff to do any design work at anytime in respect of an hotel or any type of a building. He could not therefore prior to the issuance of the summons nor anytime thereafter could he have accepted any ratified any drawings from the Plaintiff as being correct.

Mr. Matsau argued that the fact of the First and Third Defendant being directors of Sophia Company did not speak against them with regard to whether they had a *bona fide* defence to the claim against them. This he sought support for by reference to there having been, on the papers, no dealing with any of the directors by the Plaintiff except one Hulana whose address was cited at Sophia Enterprises, Thaba-Tseka. The First and Third Defendants while stating that they were directors of Sophia Company reiterated that the Company did not at any time ever instruct the Plaintiff nor authorize the said Hulana either as its agent nor in any capacity whatsoever to commission the Plaintiff to make any drawings for the company.

In addition to the fact that Molomo Mohale said the person he found at the filling station owned by Sophia Company was the Second Defendant, there was simply too plentiful references to the so called Sophia Enterprises in the papers in relation to the dealings between Plaintiff, Hulana and some of the defendants. See also the minutes of 26th March 1991. Another Court would probably find a distinct business relationship. Or it would probably not.

It will end up being very much full of doubt that Sophia Company which runs a filling station managed by the Second Defendant had a similar (not same) name with an entity which went about to negotiate plans for design of a hotel.

Another Court may say that it was an inexplicable puzzle. In addition that Court might place significance on the coincidence. The attempts by the Defendants to dissociate themselves from the Plaintiff which the Plaintiff spoke about in paragraph 7 of Molomo Mohale's affidavit and the whole gamut of facts seeking to show ignorance of the activities of the said Hulana by the Defendants will require some good effort on the part of the Defendants.

I agreed with Mr. Mohau for Plaintiff when he contended that the defence, that when Plaintiff agreed with Sophia Enterprises it was not Sophia Company, was not raised in the papers in the fine form in which it appeared as a point of law during argument. I decided that Mr. Matsau would be entitled to raise it as a point of law. This was besides the question as to whether it was a valid point or not. This point which was a legal point as to the legal persona (whether it was a company or not) that the Plaintiff dealt with belongs to those probabilities that I have spoken about. It sufficed if I said it was an arguable point. It could not be said to be fanciful.

I go back to say that if a judgment was obtained by mistake, where service had not been proper that is against the rules of Court, it had been a nullity. All things such as execution following on the improper process would be equally bad because they came as a result of a mistake common to both parties, which if the Court had been made aware it would not have entered judgment. See COMPUTER SYSTEMS AND NETWORK (PTY) LTD v MASERU CITY COUNCIL 1991-1996 LLR 82 at 92. It was not proved on the papers that there had been service of summons on First Defendant and Third Defendant.

I allowed the application for rescission and stay of execution as against the First and Third Defendants. I ordered that costs would be costs in the action. I

made the following further orders.

(a) That the Two Defendants must file all their pleas within 14 days from the 28th February 2000.

(b) Priority be given to disposing of the action by the Registrar by appointing three days of hearing which must not be later than the 15th June 2000.

T. MONAPATHI
Judge

28th February, 200