CIV/APN/217/94

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MAHLOMPHO NTSETSELANE **APPLICANT**

AND

KEKETSI NTSETSELANE **1st RESPONDENT**
LEROTHOLI THEKO **2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
On the 11th day of February 2000

Over the years a very bad practice is gradually being established in this jurisdiction. Some legal practitioners, representing certain litigants who have very poor or no cases at all approach these courts by way of ex-parte applications. Behind the back of respondents, they obtain undeserved "judgment" by way of Rule Nisi, under the pretext that the matter needs urgent determination. Once such an interim court order has been obtained it will be routinely, time after time, be extended over a long period. In the present matter, the rule Nisi issued in the

circumstances similar to those described above was routinely extended for a period of approximately two years. As shown by this applicant in her Founding Affidavit [at paragraph 4.1] she filed an urgent ex-parte application and obtained a rule Nisi against respondents on 7th July 1994; that is five years ago.

In this most unfortunate practice of obtaining interim court orders which are routinely extended for long periods of time, some respondents become accustomed to the denials or disruption, of the enjoyment of their rights which, as in this case, are adversely affected by such court orders to such an extend that they become comfortable with the status quo. Others just get fed up with the delays and give up fighting for their rights. Could there be justice in such a system? Conveniently the further extension of such rule Nisi are forgotten or left to die quietly. In those circumstances such undeserved "judgment" become final ones. This is sad. It is an abuse of legal process and should not tolerated.

Now, looking at this present application, I see the persistence in the practice described above. The applicant filed an ex-parte application in 1994 and obtained an order behind the back of respondent. The respondent, despite several postponements of the hearing and final determination of the matter for almost two years did not tire and give up the legal struggle for his rights. He seems to have

faith in the system and he is seeking to persuade the court to make its own decision. Even although the application was finally dismissed the applicant did not accept the decision of the court. She remained in possession of the property subject of the dispute. She has launched that very same application for the second time. She continued to deny respondent his rights while she continued to enjoy those rights. This is an arrogant resort to self help under the pretext that the court will decide in accordance with the applicant's wishes. The point ***in limine*** is raised by respondent at paragraph 2 of his Answering Affidavit that the applicant is in contempt of the court order which dismissed her application the first time and further-more she does not disclose to the court when she applied ex-parte the second time round, that she has already been informed by the chief of the village to vacate the property but she has refused. Despite her undertaking to vacate, she has remained in possession. In her Replying Affidavit, this applicant does not deny that she has remained in occupation of the property in question, in contempt of the court order which dismissed her application. She only denies that, her so remaining in possession, is in contempt of the court order dismissing her application. She does not tell the court exactly when she will vacate. She does not indicate a wish to purge her contempt. There is nothing in her affidavit to that effect. This is an unfortunate stance to adopt. The litigant must accept and obey court orders even is she or he does not like them.

In her Founding Affidavit, applicant shows this court, that after she had obtained by an ex-parte application, an interim court order, the hearing of that application for a final determination was postponed for nearly two years. She does not even attempt to complain the reasons for that undue delay. She states that the matter was set down for hearing without her knowledge while she sat at her home waiting to hear, the progress made in the matter. She does not give reasons why she did not go to her attorneys to enquire as days, weeks, months and years went passed. By this attitude she has contributed to this undue delay. **MADNITSKY v ROSENBERG 1949 (2) SA 392.** She cannot totally blame her attorneys of record as she tries in her founding affidavit. Had the matter needed urgent determination as stated in the certificate of urgency coupled with averments to the same effect in the Founding Affidavit, applicant would not have gone home to await indefinitely for notification by her counsel about the progress made in the matter for a period well over one and half (1 1/2) years without checking even once with her attorneys of record. She benefited from the delay as she remained in possession of the respondents property to his prejudice. She jumped and went to check with her lawyers once she learned from the chief about the dismissal of her application. See paragraph 2.2 of Answering Affidavit]. The person who set the process in motion was less interested in giving the court the opportunity to make its own decision. That is an improper use of the courts of law. A Rule Nisi

is just an interim measure. Applicant should not have gone home to sit and forget to give the court an opportunity to hear and determine the matter.

At paragraphs 4.2 and 4.3, this applicant avers that on several occasions the matter was postponed without being heard. These are this applicant's precise words. "Apparently the matter was finally set down for the 23rd February 1996. My lawyers did not inform me about the set down. .. .. .. I waited at home to receive notification by my counsel as to when the matter would be heard." There are many questions raised in these averments. She sounds happy that on several occasions the matter was postponed. She gives no explanation whatsoever for such postponements. There is a sense of some disquiet in her expression "apparently the matter was finally set down for the 23rd February 1996" [My underlining]. She got up and went to enquire at her attorney's office's after having ignored them for over one and half years because the matter was now heard. From the affidavit of 1st respondent, it appears the applicant was prompted by the notice to vacate the property by the chief after the service of the court order dismissing that first application. It is mischievous of the applicant not to mention in her affidavit in the present ex-parte application that notice to her to vacate the property, by the chief. In her replying affidavit, she merely denies making an undertaking or promise to the chief to vacate. She does not deny that the chief

explained to her that her application has been dismissed.

She applies for rescission of the default judgment on the basis of her default. This was motion proceedings. All the requisite affidavit had been filed. The matter was ripe for hearing and final determination. Applicant does not show this court on what basis she should have been present when the matter was heard. She was legally represented. Her attorneys of record had instructed counsel to appear. This is found at paragraph 4.5 of her Founding Affidavit. Her flimsy excuses for not knowing, or bothering to know when the matter would be heard, do not take this case any further. In terms of High Court Rules, Legal Notice No.9 of 1980 - Rule 1 any reference to a plaintiff or other litigants [including applicant] in these rules shall include his attorney with or without an advocate. That judgment, which discharged with costs the Rule Nisi and dismissed the application was not a default judgment. It was delivered after consideration of the issues raised in the affidavits filed of record. **ISSACS AND OTHERS** v **UNIVERSITY OF THE WESTERN CAPE 1974 (2) 409.** It is not proper to apply to court for its recission on the ground that the applicant was in default. The applicant was legally represented by counsel who had been instructed so to appear on her behalf by her attorneys of record. That judgment was therefore a final judgment. The proper procedure would be an appeal and not a rescission.

For this application for rescission of a default judgment to succeed, there are certain prerequisites which must be satisfied in terms of the High Court Rules and common law. Section 27 (6) (a) and (b) High Court Rules, Legal Notice No.9 of 1980 provides,

> "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 judgment apply to court, on notice to the other party, to set aside such judgment. [My underlining].
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> (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. [My underlining].

This applicant did not apply within the stipulated period. The excuse that the counsel newly engaged was in court the whole week, is not satisfactory. There must be a reasonable and acceptable explanation for failing to comply with the rules. **CHETTY v LAW SOCIETY TRANSVAAL 1985 (2) 755.** The rules of court are made for smooth running and proper operation of the courts. They are made with the full knowledge and expectation that lawyers representing litigants will be in court attending to the matters therein all the time during court hours and days. It cannot be an acceptable excuse that the litigant failed to file her papers

timeously because her lawyer was in court. How does that prevent the filing of papers timeously? According to this applicant, [see paragraphs 4.6, 4.7 and 4.8.] she was upset by her lawyers who failed to inform her about the dismissal of her case. She decided immediately to leave them and went about to find another counsel for herself. She does not say what she did for a week or so. Did she look for another lawyer, where? When? What was the result? She goes on to say she only managed to find another lawyer on the 25th [- of what?] During the week the lawyer was in court. So what? Where should the lawyer be? It was decided in the case of **SALOOJEE AND ANOTHER N.N.O. V MINISTER OF COMMUNITY DEVELOPMENT (2) SA 135 at 140** that "where the party realises that it has not complied with the rules, it should without delay rectify the position or at lease get up and attempt to rectify timeously." This applicant does not give true and really reasons which prevented her from obtaining a lawyer that could do and file the necessary papers timeously.

It is totally unsatisfactory and unacceptable for applicant to claim that her failure to file her present application timeously was because she could only manage to find another lawyer on the 25th of an unspecified month and year. She has not given a satisfactory reason for her failure to find a lawyer here in Maseru within the required period. For the fact that after instructing an attorney who obtained

an interim court order for her in the first application, she went home to sit and wait without even checking once with her lawyers the progress of her case, proves this applicant to be a very sloth litigant with tendencies bothering on irresponsibility.

Despite there being a specific requirement that such application for recission of judgment should be on Notice to the other party, this applicant once again proceeds on ex-parte application. This is wrong and for this approach this application must fail.

Rule 27, 6(b) High Court Rules requires the applicant to furnish security to the satisfaction of the registrar for payment to the other party of costs for both the default judgment and the application for rescission. There is no proof of payment of such security. The counsel who appeared for applicant, when I enquired about this issue, he indicated that his investigations disclosed that no security for costs had been paid. There is no allegation that there will be compliance with this requirement even belatedly. Once again this application on this basis alone must be dismissed. This applicant is not convinced that she is making an application for rescission of Default judgment. The total disregard of all that is required of her in making such an application merely demonstrates her insincerity. This application has no merit.

The question of bona fide defence and prospects of success, should be considered together with the question of default. **DE WITTS AUTO BODY REPAIRS (PTY LTD v FEDGEN INSURANCE CO. LTD 1994 (4) SA 705 E.** When these two necessary requirements are considered jointly, the court in the exercise of its discretion is able to do justice between the parties by balancing their interests more especially if the outcome is to result in an unjustifiable prejudice. Even although this application has already failed and must be dismissed on the above mentioned grounds, nevertheless, I must still consider the last ground of bona fide defence and prospects of success.

Applicant is claiming that the property she occupies belongs to her as the heir of her late husband. The 1st respondent claims that the property belongs to him as his inheritance from his late father whom this applicant claims to be her husband. The question to be determined therefore is whether or not this applicant is a lawful wife of the 1st respondent's father. It is not in dispute that 1st respondent father was first married to the mother of 1st respondent and that marriage still subsists. He was so married to the 1st respondent's mother by civil rites prior to his entering into a purportedly customary marriage with this applicant. Can he validly marry another woman while that marriage subsisted? The answer is definitely "No". MAKATA v. MAKATA. Whether or not he pays full or part "bohali" for any

other purported subsequent marriage, that cannot, I repeat cannot constitute a valid marriage.

The marriage that is null and void ***ab initio*** cannot at any stage or time become valid unless the position of the parties changes. 1st respondent's father remains a married man until death parted him from 1st respondent's mother. This applicant cannot become his wife in death.

As I have said earlier on that there is no merit at all in this application, it is dismissed with costs. By behaving in this arrogant manner of not paying security for costs, not purging her contempt, the applicant must be penalised for this despicable behaviour. She proceeded by way of ex-parte application and did not disclose the facts of her encounter with the chief, the facts which if disclosed, the applicant could not have obtained that court order. The costs are at the attorney and client scale.

K.J. GUNI
JUDGE

11th February 2000

For Applicant: Mr Masiphole

For Respondent: Mr Mafantiri