CIV/APN/350/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

QUINTINO GONCALVES VICENTE — Applicant

and

LESOTHO BANK LIMITED — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 2nd day of February 2000

This was an application for rescission of a judgment on the basis that it was granted by mistake common to all the parties.

Parties herein were the same under the above case number in a matter (original application) in which judgment was entered against the Applicant on the 21st October 1999. It was that judgment which the Applicant wanted to be rescinded, in the present application, in terms of Rule 45(1)(c). He said there had been a mistake as a result of which the judgment was decided on facts, a version of

which had been supplied by the Respondent and "with which Respondent subsequently concurred."

It sufficed to spell out the prayers in the original application . They were in part, as follows::

1. Dispensing with the normal periods of notice prescribed by the Rules.
2. Interdicting the respondent from selling the Applicant's immovable property consisting of business premises on a portion of the plot bearing Land Act Lease number 23123-213 situate at Maputsoe, in the Leribe district which portion measures 1485 square metres save pursuant to a judgment by a court of competent jurisdiction against the Applicant in favour of the respondent.

3. Interdicting the sheriff and deputy-sheriffs of this Honourable Court from acting upon any writ of execution or other similar instrument purporting to authorise such sale.

4. Directing the respondent to pay the costs of this application.

5. Granting the applicant further or alternative relief."

I have underlined the plot number because it became relevant in this application. Applicant said at paragraph 4 of the founding affidavit that it was after judgment was reserved in the original application that he was able to ascertain the true facts. This led him to launch another application namely CIV/APN/468/99, in which Applicant sues the Respondent and two others for release of a certain lease number 23123-213 (in the name of Mooki Molapo) and other prayers.

In this CIV/APN/468/99 reference is made to investigations made while the judgment in original application was reserved. This investigation revealed that the case number between the First Respondent and one Mooki Molapo in respect of which a writ was issued was in Civil Trial 494 of 1992. The writ that was generated by the judgment in the said trial related to the property on plot number 22124-001 Maputsoe and not 213123-213 as Applicant "had imagined". This meant that he wrongly believed that 213123-213 was the disputed plot hence the basis of the original application.

As Applicant said his investigations further revealed that the summons commencing action in the said trial was an ordinary summons for money lent and advanced and had had nothing to do with any mortgage bond. The writ which was annexure GCV "3" to Applicant's papers was consequently issued against Mooki Molapo only after a *nulla bona* return had issued out in respect of his movable property. This was the extent of the mistake within whose premise the original application was granted. The original application ought accordingly to be rescinded. The Applicant submitted so.

The mistaken version seems to have emanated from the correspondence between the First Respondent and the Third Respondent regarding the said plot 23123-213 and the further aspect of foreclosure of the mortgage bond. These things did not concern the above plot but a different one. The Applicant said in the present application that he had no reason to believe that the Respondent's officers were deliberately misleading him in giving him the information which formed the basis of the original application and: -

> "That in concurring therein they were equally deliberately misleading the above Honourable Court".

It would be difficult on my part to conclude that there was any intention to deceive the Court. This was more so when regard was had to the fact that the mistaken reference to the plot by the Applicant had arisen as long ago as in the correspondence between the Third Respondent's legal department and Mooki Molapo's attorneys as the judgment in the original application shows. So that certainly the mistake as it appears has its origins in the exchange of that correspondence even before the hearing of the original application. As long as it became a mutual mistake it was unfruitful to inquire as to who caused the mistake.

I noted that before the Court it was the Applicant who had stated on affidavit and revealed all the details which were the facts which resulted in the judgment. Significantly, Respondent had had no affidavit filed but only took points of law. What was important for my inquiry was how the mistake affected the judgment in the original application and particularly whether there were good grounds upon which it could be invalidated.

Counsel for Applicant spoke about the likely prejudice to the Applicant if and when the judgment in the original application was allowed to stand. That there would be a plea of *re judicata* against the Applicant. I may say instantly that if the object of the interdict sought by the Applicant in the original application was to prevent the First Respondent from foreclosing on plot No. 23123-213 an extreme likelihood was that the parties would never come back and fight over the same issue more particularly over that plot. That fear of the Applicant about *res judicata* was indeed unfounded. By a minimum diligence on his part he should have detected the mistake about the plot over which he had no interest. And yet he bought the Respondent to Court.

That writ, annexure QCV "3", should have shown Applicant the true facts.

His contribution to the problem by bringing the Respondent to Court seemed to override any remissness on the part of other people. It was a result of negligence on his part. The dismissal of his application, which by his own confession, he had no cause to bring about, was on the basis that he had no rights over the plot at all nor to the extent that he could prevent execution over the property. This remained the situation to the extent that the status quo would remain as it was before the application. In short no rights of the Applicant were affected.

The bank would not foreclose because the cause of action namely over money lent and advance was different. Even if it did that would not concern him as far as plot no. 23123-213 was concerned. The judgment in the original application concerned rights of the Respondent over the said plot. Hence Mr. Matooane for the First Respondent submitted that the application became a futile and an academic exercise when the true facts were considered. Why would the judgment in the original judgment then threaten any rights of the Applicant? It shows that the present application was more of an academic exercise than a genuine fight over real rights.

I agreed with Mr. Sello that if appeal was to be filed on the premise of the admittedly wrong facts or even supposing it was over an issue that emerged on the wrong facts the appeal court would probably decide that this was a matter for rescission. But in my respectful view such a Court would go further and ask as to whether there was any interest and what interest the Applicant had in the disputed rights and future litigation. The basis of an application for rescission is that litigation is sought to be perpetuated (which is normally the intention of one of the parties). It is because rights have to be finally decided. The Applicant has no further rights in the judgment nor did he profess to have any in the future or in the past. That Court on appeal would find that the exercise was an academic one. On

this ground the application ought to be dismissed.

I would answer in the way I did above to Mr. Sello's submission that should the Applicant decide to institute proceedings the Court would decide that the matter was *res judicata*. That furthermore the effect would be that by reason of the judgment in the original application the Applicant's rights would have been closed out. One cannot imagine (again by Applicant's own confession), that further rights would be disputed by the Applicant over this plot No. 213123-213. Isn't the submission actually inviting a debate to resolve an academic exercise? What business would the Court have to buttress such an exercise? On this ground the application was demonstrated not to have had any merit.

As I saw it the dispute in the original application was about the right of a third party (the Applicant) to prevent the mortgagee from foreclosing on a bond when the mortgagor had defaulted. Furthermore whether an agreement, of a sale, between the third party (Applicant) and mortgagor of a portion of the mortgaged land, where no transfer had been passed in favour of the third party gave that third party the right to interdict foreclosure over the whole property. Once the mistake over the plot was discovered this dispute could not be revisited. Why would the Applicant pursue a matter which in reality he would have no interest.

The mistake over which is sought to ground the rescission could have been (and it was) in reference to the plot number 213123-213 and that there was (in fact) no foreclosure but a prior *rula bona* return over movables followed by a writ over immovable property. This had to be repeated. Mr. Matooane submitted in that regard that the Applicant still had to prove that there was a common mistake in terms of the law of contract and in addition a causative link between the mistake and the granting of the order of judgment. Towards the latter Counsel referred the

Court to the book THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA (Herbstein and Van Winsen) 4th edition by M. Dendy at pages 697 to 698. The authors of the work speak about a mistake common to the parties and refer to the above requirements as submitted by Mr. Matooane. They say:

> "This requires that the mistake to relate to and be based on something to be decided by the Court at the time."

And they referred to the case of TSHIVASE ROYAL COUNCIL AND ANOTHER V TSHIVASE AND ANOTHER 1992(4) SA 852(A) at 863AD.

The brief facts of the TSHIVASE case were interesting. While a dispute over chieftainship rights of the Venda tribe between John Tshivase and Kennedy Tshivase in the Supreme Court was pending, the President of Venda in terms of certain legislation empowering him so to do, referred the dispute to a Council of Chiefs (Khoro) "to assist with a solution." The Council thereafter met and as a result an advice was given to the President by which John was appointed chief. The pending application was thereafter finalized confirming John as chief. When the Council met later for the first time after its said recommendation of John to the President, it was revealed that there had never been such recommendation as the minutes did not reflect so. "It would seem this came as a surprise to members." See page 857 F-G.

An application by Kennedy followed, to rescind the previous final order. It was based on the allegation that the order had been granted as a result of a mistake common to both parties viz. that the Khoro had resolved that John should be the Chief. This was not controverted. As a fact, as the Court believed the President had not recommended John as some chiefs had actually spoken against that. The

minutes should have reflected that it was in fact resolved that the matter be sent back to the tribe to decide. They had been altered by the President to reflect the contrary that is that John be appointed. The altered minutes were circulated. One official who objected was charged of insubordination. This was the position that was revealed in the application for rescission which was incidentally filed after the President's death.

As in the present application the issue in the TSHIVASE case was whether the first judgment was granted as a result of a mistake common to both parties. In the TSHIVASE case both disputants believed that the Council had recommended that John be made the Chief. In the present case the parties had believed that the dispute was over plot no. 23123-213. On the question of the right of foreclosure (which the original application was also concerned with) Rule 45(1) envisages firstly that that evidence if known should have caused the Court to reach a different decision. This was so because not only should a mistake be relevant it must be fundamental. How can it be fundamental when the present Applicant, by his own admission, was disputing a right over a plot in which as a fact he had no interest? If he has no interest to plot 23123-213 then there is nothing fundamental about his rights.

That substratum of the judgment in the original application could only have been constituted in favour of the Applicant if the Applicant had an interest in the plot which he claimed. This I say despite the reference to plot 23123-213 in the notice of motion in CIV/APN/468/99. It is not a reference to plot no 22124-001. Contrast this with what is contained in paragraph 4.2.1 of the founding affidavit in that application.

The case of TSHIVASE is to be distinguished in that it found that the

mistake about the assumption that the Council had recommended John was the substratum of the judgment. If the Applicant herein had said he would continue to claim the rights over plot no. 23123-213 that would be a different matter. Perhaps then, there would be a basis for constituting that mistake as a fundamental one. But would he really claim the same rights on similar set of circumstances about which he has said (such circumstances) were mistaken? The answer should be in the negative.

I thought the application should be dismissed with costs.

T. Monapathi
Judge

2nd February, 2000

For the Applicant : Mr. Sello

For the Respondent : Mr. Matooane