CIV/APN/494/99
CIV/T/258/99
IN THE HIGH COURT OF LESOTHO

In the matter between:-

SUK BOK HAN APPLICANT
Vs
SANG JUN KIM RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete on the 11th of July 2000.

This is an application for rescission of a judgment granted by me on the 1st November 1999 (CIV/T/258/99). It should be noted at once that in that civil suit pleadings had been closed and the matter had been set for hearing on the 1st November 1999 with B. Sooknanan & Associates being attorneys of record for the defendant. Plaintiff had as his attorneys Messrs Webber Newdigate.

In his original summons the plaintiff (the present respondent) sued the defendant (the present applicant) for cancellation of a verbal agreement entered into between the parties

in May 1997 and for the payment of the sum of M282,000.00 "being a refund of the capital contribution" paid by plaintiff to a partnership with Auto Plaza (Panel Beaters). In his plea filed after certain particulars had been supplied by plaintiff, the defendant states "Plaintiff never paid any amount to defendant." This complete denial was made despite the annexed "letter of certification" whose fair translation reads thus:-

"Letter of Certification

The total money: W56000,000
(approximately Rand 282,000)

This is to certify that Kim, Sang Jun handed in the above-mentioned amount of money to Han, Seok Bok as partnership money for Auto World Plaza (Panel beater's workshop) during from February, 1997 to the end of April 1997.

1997.5.10 Han, Seok Bok
Kim, Sang Jun

The above -mentioned money is legally used as expenses for planting workshop corporation, buying and building factory, settling, making divers administrational procedures, running workshop under confirmation of Hand, Seok Bok and Kim, Sang Jun. Therefore, both of us will not raise an objection to this and we agree to work for the development and growth of Auto World Plaza and sign our names hereof.

1999.3 Han, Seok Bok
Kim, Sang Jun"

On the date set down for hearing that is the 1st November 1999, Mr Molete appeared for the plaintiff and Ms Qhobela who appeared for the defendant immediately handed in a Notice of Withdrawal which read "kindly take notice that the undersigned Attorneys hereby withdraw as attorneys of record for the defendant in the above mentioned matter .....dated at Maseru this 1st day of September 1999."

Facing this upturn of events Mr Molete insisted to proceed with the trial, because the matter had been set for hearing and he had engaged at great expense a Ms Hanna Joo, a Korean whom he wished to be sworn in as a ad hoc court interpreter.

In the absence of a plausible explanation regarding the absence of defendant and no application for adjournment or postponement being made by Ms Qhobela, the Court without much further ado proceeded with the trial under the provisions of Rule 41 of the High Court Rules 1980. It reads:-

(1) "If when a trial is called, the plaintiff appears and defendant does not appear, the plaintiff may prove his claim so far as the burden of proof is upon him, and judgment shall be given accordingly, in so far as he had discharged such burden;

Provided where the claim is for a liquidated amount or a liquidated demand no evidence shall be necessary unless the court otherwise orders" (underlining my own).

Mr Molete, despite the liquidated nature of the amount (M282,000.00/W56 000,000 Korean currency) elected to lead evidence of the plaintiff who then proceeded to inform the court (through the sworn Korean interpreter) that he is a Korean citizen and a Presbyterian Christian and that the defendant (also Korean) had convinced him while in

Korea that there existed good business prospects in Lesotho in Africa and persuaded him to contribute some money towards a panel beating business and that he ended up depositing M282.000 in favour of the defendant and that this was evidenced through a "Notarial Certificate" signed by them at the Korean Embassy in Pretoria on the 12th May 1999. The Notarial Certificate was handed in as an exhibit "A". He proceeded to inform the court that in Maseru the defendant reneged on the agreement and declined to do business with him in clear breach thereof.

He then asked for judgment that their agreement be cancelled and that the defendant be ordered to repay the sum of M282,000.00 at 22% per annum interest plus cost of suit. This was granted by the court.

The plaintiff subsequently served upon the defendant on the 10th November 1999 a writ of execution in satisfaction of the judgment in CIV/T/258/99 and several items of property belonging to defendant were attached.

The defendant then made an urgent application through Mr Z. Mda for rescission in which he prayed for an order setting aside the judgment granted against him on the 1st November 1999.

In his founding affidavit the defendant (now hence forth applicant) in seeking to explain his absence on the 1st November 1999 and he informs the court that on that day he went to the offices of Sooknanan (Qhobela) and was told that she had already gone to court. He hurried to the court premises (which he says are the present Maseru Subordinate Court Complex) and there looked for Ms Qhobela in vain; and that at about 2:30 pm he went back to the Sooknanan offices where he met Ms Qhobela who then and there informed him that she had also filed a notice of withdrawal as attorneys of record when

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she did not see him turning up at court. He then explained to her what had transpired that morning and it turned out that he had gone to the Subordinate Court complex and instead of going to the Palace of Justice "about which I knew nothing." The propriety of withdrawal by Ms Qhobela in circumstances leaves much to be desired and if the absence of client was the only good reason, she could have asked the court to postpone or adjourn the matter, at least to the afternoon or the following day. She just abandoned ship and her client drowned. In his founding affidavit the applicant further states that he has a bona fide defence to the plaintiff's (present respondent) claim in that they had entered into an oral agreement in terms of which he had "agreed to represent the first respondent in buying shares in Auto World Plaza (Pty) Ltd" and that the money given to him for the stated purpose was M282,000.00 and further that in compliance with the aforesaid agreement he did pay the said amount to the said company and acquired three hundred and fifty shares on behalf of the respondent and that subsequently a share-certificate of the said company was issued in his name. He attached an uncertified copy of the share certificate and he denies that the M282,000.00 was given to him as capital contribution for a panel beating partnership business. He says:-

> "I intend to amend my plea in the main action in order to reflect the correct position as set out above."

He does not, it should be observed, explain why her original attorneys Sooknanan filed a plea in which he completely denied receiving the M282,000.00 from the respondent. In the circumstances one may even be led to speculate whether Sooknanan withdrew because the applicant was now resiling from his former instructions.

Ms Qhobela also filed a supporting affidavit in which whilst associating herself entirely with the contents of the applicant's founding affidavit in so far as they relate to her, she does not explain why she withdrew or indeed left her absent client in the lurch! I must

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state that here and now that a legal practitioner who has been engaged by a client to represent him or her in a trial before court, owes that client a supreme professional duty and that duty involves protecting the interests of such client to the best of his or her professional ability. In a case such as the present and without unduly inquiring into the otherwise confidential reasons for withdrawal, Ms Qhobela had a professional duty to see that the interests of her

client were safeguarded and in the circumstances of this case she could have done this by asking for an adjournment to seek out her client or a postponement to facilitate engagement of another lawyer. The case proceeded on the 1st November 1999 upon her immediate withdrawal and this court had not been assured that such withdrawal had been communicated to their client.

Appearing Mr Mda for the applicant in this rescission application argued in the main that the relevant Rule to apply is Rule 45 (l)(a) of the High Court Rules. It reads:-

> "The Court may, in addition to any other powers it may have mero motu, or upon the application of any party affected rescind or vary
> b) an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby"
> c) .....
>
> 4) Nothing in this Rule shall affect the rights of the court to rescind any judgment on any ground on which a judgment may be rescinded at common law."

He submits, and correctly so, that the court has a discretion to exercise to rescind its own judgment on various grounds such as fraud, discovery of new documents, error or procedural irregularity. At common law, any cause of action that is relied on as a ground for setting aside a final judgment must have existed at the date of the judgment - see Herbstein and Van Winsen - The Civil Practice of the Supreme Court of South Africa 4th Ed 19976 p.690,695; Swadif Pty Ltd vs Dyke No -1978 (1) SA 928 at 939. At

common law the court has power to rescind a judgment obtained on default of appearance provided sufficient cause for rescission has been shown - that is (1) that the applicant seeking relief must present a reasonable and acceptable explanation for his absence and (2) that on the merits that the applicant has a bona fide defence which, prima facie, carries some prospects of success - Chetty vs Law Society. Transvaal -1985 (2) SA 756, Nyingwa vs Moolman - 1993 (2) SA 508. Good cause need not be established when the application for rescission is brought in terms of Rule 45 (1) (a) -Topol and others vs LS Group Management Services (Pty)Ltd - 1988 (1) SA 639.

In the unique circumstances of this case it was clear that the judgment granted in favour of the plaintiff (respondent) was not a judgment granted in default under Rule 27 but was -a judgment granted under Rule 41 (supra) in the absence of the defendant (his attorney having withdrawn). I should here point out that the withdrawal by Ms Qhobela in this case amounted in fact to resignation and which should have been permitted by the court only upon good cause being shown. In order to be effective the withdrawal must of necessity be communicated to all parties including the client. Rule 15 (4) of the High Court Rules is in point and it reads –

> "(4) Where an attorney acting for any party ceases so to act he shall forthwith notify the Registrar and all parties accordingly. The notification to the Registrar shall specify the date when, the parties to whom and the manner in which the notification was sent to all parties, and shall be accompanied by a copy of the notification so sent.

> Such notification shall be of the same force and effect as a notice under sub-rule (2). Provided that unless the party for whom the attorney was acting himself within 3 days notifies other parties to the proceedings of a new address for service, it shall not, save in so far as the court orders otherwise, be necessary to serve documents on him "(my underlining).

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The rationale behind this Rule is to guarantee the right to legal representation in cases where a defended party is faced with a problem of an attorney empowered by him abandoning and resigning from the case. (See Transorient Freight Transporters Corporation vs Eurocargo Coordinators (Pty) Ltd - 1984(3) SA 542, Herbstein and Van Winsen (supra) p. 228, 629-30. It is my considered view that the court committed a "procedural irregularity" in permitting the plaintiff to proceed with the case and to obtain judgment under Rule 41.- Herbstein & Van Winsen (supra) (p.690). This in my view is a ground which this court mero motu considers a ground sufficient to rescind the judgment it made on the 1st November 1999 - because Rule 15 has in its entirety mandatory provisions. Ex facie, the "Notice of Withdrawal" in question filed in the record is copied only to the Registrar and to the Plaintiff's attorneys Webber Newdigate and not to the applicant and does not comply with the mandatory provisions of Rule 15(4).

Mr Mda in his rather ingenious argument-spiced with eloquent demagoguery argued that the applicant was denied his basic right to a fair trial as guaranteed under the Constitution of Lesotho - Section 12(8) It reads:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time."

He argued nonetheless that the proceedings of the 1st November 1999 were not fair because (a) the applicant's attorney had withdrawn or resigned without informing applicant and (b) the court did not afford him opportunity to elect another representative

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or to prosecute on his own defence, regardless of its merits or demerits. These are good submissions. Mr Mda again submitted that the explanation of the applicant being a Korean as to why he failed to pitch up at the Palace of Justice on the morning of the 1st November 1999 is plausible and has not been controverted. Mr Mda also pointed out that where, as in this case, the applicant seeks to have a judgment rescinded the court should only dismiss the application after satisfying itself that the matter cannot be entertained in terms of either Rule or the common law. He cites case of Nyingwa vs Moolman - 1993 No (2) SA-508 where White J had this to say:

> "Although I agree with Mr Hock's submission that the application cannot be brought under Rule 31(2) [Our Rule 27 (6)] I do not believe that that is the end of the matter. That would be too formalistic an approach. This court must also decide whether the

> application can succeed under the provisions of either Rule 42 (1) [Our Rule 45 (1)] or the common law."

Tshabalala & Another vs Peer 1979 (4) SA 27. He argues that if the court, at the time it allowed judgment to be obtained under Rule 41, had known that the applicant had gone to a wrong court, it would have not allowed the respondent to have judgment as it did Nyingwa vs Moolman No 1993 (2) SA 508 at 510. He says that the applicant has presented a reasonable and acceptable explanation for his default. In the case of Meer Leather Works Co. vs African Sole and Leather Works (Pty) Ltd - 1948 (1) SA 321(T) the judgment by default had been granted by a magistrate when the appellant's attorney withdrew without instructions from client. Nesse J stated as follows:

> "Whatever the reasons may have been for Mr Clur's withdrawal, the judgment is a judgment given in the absence of a party against whom it was given and when I say in the absence of the party I mean in the absence of a party or of a representative of such party."

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Mr Mda submits, perhaps correctly so, that Ms Qhobela in withdrawing without notice to her client was remiss in not following the procedure in Rule 15.

Faced with the rather glaring disparity between his original plea and that now canvassed in his application for recission, Mr Mda was at great pains to point out that there was possible misunderstanding between the applicant and his former attorneys and the applicant could in due course indeed be entitled to amend his plea after the rescission had been granted. He argued that if the court holds that the judgment of the 1st November 1999 was erroneously granted in the absence of a party affected by it, the judgment should without further inquiry be rescinded or varied - Tshabalala & Anor vs Peer (supra). The question of what constitutes an error for the purposes of Rule 45 must of course depend upon the particular circumstances of each case (see Topol vs L.S. Group Management Services - 1988 (1) SA 639; De Sousa vs Kerr -1978 (3) SA 935).

Mr Molete, for the plaintiff/respondent argued in the main that since the court had granted a judgment under Rule 41, the court was now functus officio because the pleadings were closed and the respondent had proven his case as required by the said Rule 41. This may be so, but in my view, the main purpose of Rule 45 is to create an exception to the rule that once a court has made a final judgment it becomes functus officio and it cannot set it aside; even at common law, the court has power to rescind its own judgment if such judgment is induced by fraud or error etc. This is a remedy provided by our law permitting the court to correct patent injustices and it is not a remedy which can be made on appeal since the procedure for rescission is by way of affidavit.

Mr Molete argues that Ms Qhobela was present in court - but he does not go on to say

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also that she was also resigning from the case. He says that the plaintiff is entitled to his judgment and the applicant can go and sue his attorneys for loss caused by their remissness. I

have already held that a procedural irregularity was committed in allowing the proceedings to continue under Rule 41.

Mr Molete argues that the court did not grant judgment in error at all because all pleadings were in order -save for the absence of the defendant and his resigning attorney. He submits that even if the defendant was present, judgment could still have been granted at the end of the day because of the defendant's conflicting pleas. In my view fair hearing as envisaged by section 12(8) of the Constitution means that regardless of the merits of his claim or plea, a party in a civil litigation must be afforded opportunity to motivate such claim or defence; and in the circumstances of the case, it cannot be said that the applicant had a fair hearing, and the words of Gubbay CJ in Smyth vs Ushewokunze and Another - 1998 (3) SA 1125 (Zimbabwe) are apposite:

> "Hence the question that arises is whether the applicant's right to a fair hearing by an independent and impartial court established by law as enshrined in section 18(2) of the Constitution, is likely to be contravened.
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> In arriving at the proper meaning and content of the right guaranteed by section 18(3), it must not be over-looked that it is a right designed to secure a protection and that the endeavour of the court should always be to expand the reach of a fundamental right than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well at to the letter of the provision.....The aim must be to move away from formalism and make human rights provisions a practical reality for the people.....Section 18(2) embodies a constitutional value of supreme importance." (my underlining).

I am satisfied that the applicant has shown that his right under section 12(8) of the Constitution to a fair hearing was put in jeopardy. A purposive interpretation of this section leads one to come to this inevitable conclusion [see also Devendish -Interpretation of Statutes (1996) p.35].

He lastly submits that in case the court is inclined to exercise its discretion in favour of rescission, the court should in the exercise of that discretion order the defendant to provide security and to undertake to abide by the final judgment of the court.

In the circumstances of this case and having regard to the discretion that I have and dismissing the contention that I am functus officio. I hold that when the judgment was granted in favour of the plaintiff in the absence of the defendant and in the face of her resigning attorney, a procedural irregularity (Rule 15) occurred, entitling this court to grand rescission in the exercise of its wide discretion. I also hold that the version of the defendant in explaining his default was reasonable and plausible. I also hold that it is not necessary to go into the prospects of the defendant's defence at this stage. In Letoao vs Sehapi CIV/T/600/88 (unreported) Kheola J. (as he then was) stated as follows:

> "Most of the issues raised by applicant in this (rescission) application are disputed by the respondent. It seems to me that if at the trial the applicant can prove the allegations he has made in this application, the trial court might find that he has a bona fide defence. I think this is a proper case to go to trial to enable the parties to

lead viva voce evidence in order to enable the court to resolve the highly disputed matters."

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The application for rescission is granted and I also make the following order –

a) The respondent is granted leave to have the case CIV/T/258/99 set down within thirty days to a suitable date for hearing.
b) The applicant may file any process regarding his original plea, if he so decides.
c) The applicant must provide security satisfactory to the respondent and undertake in writing to abide by the final judgment of the court.
d) Costs shall be costs in the cause.

S.N. PEETE
JUDGE

For Applicant: Mr Mda
For Respondent: Mr Molete

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