CIV/APN/445/99
IN THE HIGH COURT OF LESOTHO

In the matter between:
RAPHAEL TSOTETSI
v
LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu on the 4th day of May, 2000

This is an application for rescission of judgment granted by default by Guni J on the 22nd November, 1999. It is opposed by the applicant.

Proceedings had been instituted by way of application. The Notice of Motion, which was filed of record on the 29th October, 1999, had also been served on the respondent on the 29th October, 1999. I will assume it had first been served before being filed in the High Court. It is as follows:

> "NOTICE OF MOTION KINDLY TAKE NOTICE
> that an application will be made before this

Honourable Court on behalf of the above Applicant on 8th day of November 1999 at 9.30 a.m. or so soon thereafter as the matter may conveniently be heard for the order in the following terms;

1) Directing the Respondent to pay the Applicant monies which the Respondent had underpaid Applicant as from the date of Applicant's promotion, together with the increments thereto, till the Applicant's termination of services with the Respondent;

2) Directing Respondent to pay costs of this application;

3) Granting applicant such further and/or alternative relief;

TAKE FURTHER NOTICE that Applicant's affidavit will be used in support of these prayers.

DATED AT MASERU THIS 25™ DAY OF OCTOBER 1999."

The important facts to note about this Notice of Motion are the following:

1) It informed respondent that application would be made on the 8th November, 1999 at 9.30 a.m..

2) It did not conform as nearly as possible with Form J.

The Respondent had properly been told that he should be in court at 9.30 a.m. on the 8th November 1999, and should have been there. His failure to be there is undoubtedly remissiveness. I will return to this issue later.

When a litigant proceeds by way of application, he is bound to follow the Rules of Court. They have not been introduced to make litigation technical or to make court

procedure a mine-field in which a litigant is often sunk by collision with many meaningless rules, that ultimately lead to a denial of justice. Rule 8(7) of the High Court Rules 1980 provides:

> "Every application other than one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form "J" of the First Schedule hereto and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice is given."

The main features of Form "J" are the following:

(i) Applicant gives notice to respondent that he intends to bring a claim before the court.

(ii) In the notice of motion applicant must tell respondent the nature of his claim or remedy he seeks.

(iii) The notice of motion also serves respondent with an affidavit accompanying his application containing the evidence supporting his claim.

(iv) It also notifies respondent of the address within 5 kilometres at which applicant will receive all answering papers from respondent.

(v) The notice of motion must warn respondent that he is expected to notify applicant if he intends to oppose the application within a specified period.

(vi) The notice of motion goes further and emphasises to respondent that "further take notice that you are required to appoint in such

notification an address within 5 kilometres of the Registrar at which you will accept notice and service of documents in the proceedings".

(vii) Respondent in the notice of motion is further told "take notice further if you intend opposing this application...within fourteen days of such notification, to file your answering affidavits if any".

(viii) Finally the notice of motion tells respondent that if no notice of intention to oppose the application is given, the application will be heard on a particular date and a specific time.

At the outset, it has to be emphasised that the rules although binding should be applied purposively to achieve the ends of justice. Rule 59 therefore states "the court shall always have discretion, if it considers it to be in the interests of justice, to condone any proceedings in which provisions of these rules are not followed". Certainly condoning a departure from the rules by an applicant for the purpose of denying respondent a right to put its case by denying an application for rescission of judgment causes a breach of the audi alteram partem principle. This, courts are often reluctant to do. In Barclays Nationale Bank BPK v Badenhorst 1973(1) SA 333 in a case where an application for provisional sequestration had been made on an incorrect form, the issue in deciding whether to condone this became whether there had been prejudice to respondent. It seems to me that here too, good cause has to be shown whether in the circumstances of the case the court should waive the requirement of following Form "J".

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If no prejudice to respondent is shown, then the court might at its discretion condone non-compliance with the Rules.

Mr Van Tonder who appeared for respondent (against whom a default judgment was granted) drew my attention to the fact that respondent filed with the Registrar a notice of intention to oppose the application on the 5th November 1999. He therefore argued that had a proper Notice of Motion been used in bringing this application, the matter would not have been put on the roll on the 8th November 1999. Even if it had been, the matter would not have proceeded because that date of hearing depended on failure to file the Notice of Intention to Oppose with the Registrar.

There is no doubt that Mr Van Tonder is right. That is precisely the reason Mr Justice Mofolo postponed this matter to a date to be arranged with the Registrar. At Mr Khauoe's request, Mofolo J directed respondent to pay costs.

Although this Notice of Motion of applicant was (in many respects) an irregular document within the meaning of Rule 30, failure to attend the court hearing despite the invitation to do so was in the eyes of the court unacceptable behaviour. Granting an order of costs against respondent was the proper thing to do in the circumstances.

The fact that there was failure to comply with Rule 8(7) of the High Court Rules 1980 and Form "J" thereof was not in issue because it was not raised. Had Mr Van

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Tonder for respondent, on the 8th November 1999, appeared, he could have legitimately raised it and obtained an order of costs in his favour. This should have been the case because Rule 8(9) provides:

> "If the respondent does not... notify the applicant of his intention to oppose, the applicant may place the matter on the roll for hearing by giving the Registrar Notice of Set Down before noon on the court day preceding the day on which application is to be heard."

In short this application should not have had a notice of hearing before respondent had been given an opportunity to respond.

There is substance to what the Chief Executive of respondent said at paragraph 3 of his supporting affidavit to the application for rescission of judgment where he says respondent having "filed their Notice of Intention to Oppose on the 5th November 1999.... Parties to this matter became aware that the matter was an opposed matter, so that appropriate steps and procedures, pursuant to that Notice, had to be followed". By appropriate steps the Chief Executive means steps that appear in Form "J" of the Rules of Court. In particular respondent was entitled to be given 14 days within which to respond to applicant's averments. Applicant seems to have taken a view of the Rules that favours him exclusively although the Rules are balanced in order to level the playing field.

Mr Khauoe made much of the fact that (without notifying respondent) he took a

default judgment three days after the 14 days within which respondent was expected to have filed opposing papers. I need only point out that this did not entitle applicant to take a default judgment without giving respondent any notice. In action proceedings applicant should have served respondent with a Notice to File Plea, before respondent could be barred. It is therefore clear respondent had not been barred from filing opposing papers. The delay could only lead to an adverse order as to costs if the matter had to be postponed on the date of hearing, because respondent wanted to file opposing papers. In other words there should be no appearance before a judge without inviting a respondent who has signified an intention to oppose.

Mr Khauoe for applicant in opposing the application for rescission of judgment argued that his notice of application was as near as possible to Form "J". In his view he was not in breach of Rule 8(7). I have already said this is not the case, applicant's Notice of Motion does not comply with this sub-rule. It only says when the matter will be heard, what the applicant's claim is and that applicant's affidavit will be used in support of the application. It lacks five other essentials that Form J contains. I will later go into the reasons why these other essentials have been deemed necessary in the Form "J" and in the Rules of Court. Sufficeth to say that the Notice of Motion is directed to a person who may not have any training in law. Hence the many warnings and notices that the respondent is given in the Notice of Motion.

It seems to me therefore that the audi alteram partem principle having been built

into Form "J" of the Rules of Court cannot be easily ignored. Not only does Form "J" apply many of the rules of court, it also ensures fairness in the granting of default judgments. It is by no means unusual for parties who have obtained a default judgment to resist attempts to rescind it. They go so far as to say every person is presumed to know the law when they resist applications for rescission of judgment. Courts are often inclined to uphold the principle of audi alteram partem by rescinding default judgments. In fact Atkin LJ in the Privy Council faced with the submission that every person is presumed to know the law said there is no such presumption. Dealing with a default judgment he said:

> "There is here no evidence to say that the defendant at the time...had any knowledge of his right to set the judgment aside. I cannot think that there is a presumption that he knew of his remedy.... For my part, I am not prepared to accept the view that there is a presumption that any one, even a judge knows all the law. There is a rule that ignorance of the law does not excuse, a maxim of very different scope and application." -Evans v Bartlam [1937] AC 473 at page 479.

Courts nevertheless insist on discipline in the way civil proceedings are conducted. To achieve this they are obliged to use their coercive powers of granting default judgment and in fitting cases refusing to rescind them. In granting default judgments courts have to ascertain that there was service of court processes and of all notices that are built into the process of granting default judgments.

Mr Khauoe for applicant correctly pointed out that respondent was obliged to

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serve applicant with his Notice of Intention to Oppose the application. Indeed he should have done so. Unfortunately the Notice of Motion did not warn applicant that he should serve applicant with the Notice of Intention to Oppose the application as it should have done - had Form "J" been followed. Consequently respondent merely filed the Notice of Intention to Oppose with the Registrar and ended there. That being the case applicant is blaming respondent for applicant's own failure to abide by the Rules of Court.

Mr Justice Mofolo had specifically postponed the matter on the 8th November 1999 and mulcted respondent with costs for failing to be in court although he had been warned to be present. This had been done to give respondent an opportunity to file his answering affidavit. The matter had been "postponed to a date to be arranged by the Registrar" Mr Khauoe during argument informed me that he had discovered the Notice of Intention to Oppose in the judge's file on the 8th November 1999 and therefore he was obliged to ask that the matter be postponed with costs. I do not understand how Mr Khauoe came to set down the matter because Rule 8(3) provides:

> "Where no answering affidavit nor any notice referred to in sub-rule 10(c) has been delivered within the period referred to in sub-rule 10(b) the applicant may within four days of the expiry of such period apply to the Registrar to allocate a date for hearing of the application."

Consequently respondent's Chief Executive in his affidavit supporting the rescission of judgment application at paragraph 5 says he checked the Motion Roll of the 22nd

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November 1999 and found that this matter did not appear in the Motion Roll as it should have, if applicant had been allocated a date by the Registrar. This fact is not denied. Ail applicant says is that respondent never served him with any papers (a fact which is quite true) but which does not meet respondent's querry.

It seems to me that if I am to throw the book of rules at respondent at the instance of applicant, then applicant must have fully complied with the rules. Court process that do not

conform to the most elementary rules of court should be rejected out of hand by the Registrar. In discharging this function, the Registrar must act bona fide in determining whether the process filed in his registry is receivable in terms of the Rules of Court. He or she must (of course) not take upon himself a decision which should properly be the function of the court. —See Peskin v Wisdom N.O. 1948(3) SA730 at 731. If the papers are in order in specified categories of cases in England, default judgments can even be entered by proper officers in the registry of some divisions of superior courts in the same way as clerks of court in our country enter default judgments in the Magistrate's Court. —See Jacob et al The Supreme Court Practice 1982 at page 136 and 137. It should not therefore be forgotten that in granting a default judgment the grantor of such a judgment in most cases does not deal with the merits. The court in the granting of a default judgment was, as Lord Atkin noted in Evans v Bartlam [1937] AC 480, giving expression of its coercive power because there has been failure to follow rules of procedure. The view I take is that there should be even-handedness in treating both sides in respect of breaches of rules of procedure.

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I am not persuaded that respondent's conduct amounts to culpable remissiveness. Respondent should however have done better than it did, in the way it responded to applicant's application.

I have approached this granting of this default judgment from the premise that respondent was as good as not represented. In actual fact Mr Van Tonder who signed the Notice of Intention to Oppose is an advocate as more fully appears in his certificate of urgency. It is true that Mr Van Tonder is not practising law as he is an employee of respondent. When I asked him why he did not attend court on the 8th November 1999, he told this court that he might have not kept this matter in mind because of his other duties. The respondent did not in the affidavit supporting the application explain why he did not attend the hearing on the 8th November 1999. I however accept that as the Chief Executive Officer stated, he must have expected applicant not to proceed with the matter after he had filed a Notice of Intention to Oppose. This should have been the position had the rules been followed by following Form "J" in bringing this application.

Applicant has not furnished security for costs as he was expected to in terms of Rule 27(6)(b). This was a serious omission if this application was being made in terms of Rule 27. In view of failure to comply with the Rules by applicant this application could well be governed by Rule 45(1)(a) because judgment was erroneously granted in the absence of respondent.

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I note that before respondent applied for rescission of judgment, he had already filed an opposing affidavit which disclosed what might be a defence to applicant's claim. To that extent this application for rescission of judgment would seem to be in order.

I note that legal practitioners employed by Statutory Corporations may appear before our courts and take instructions direct from their employers—See Section 42 of the Legal Practitioners Act 1983. They have been permitted to do legal work of attorneys on an ad hoc basis. Yet practising attorneys are expected to have offices that are manned full-time. The staff of such attorneys know what to do with pleadings and other court processes that are filed from time to time as litigation progresses. Statutory Bodies do not always have staff assigned

to litigation, nor are they expected to. It often happens that court process (where they represent themselves) is received and not brought to the attention of professionally qualified legal practitioners. This happened in the case of Computer Systems & Networks (Pty) Ltd. v Maseru City Council 1991-1996 LLR 82. In that case, like in this one, the legal practitioner ended not being present on the date of hearing. In that case, when a default judgment had been taken, the ad hoc practitioner concerned did not have an adequate familiarity with the Rules of Court. This is the case here too.

In argument Mr Van Tonder said he had been assigned other duties on the date of hearing. Consequently he could not remember the date of hearing. That was the
reason for his non-attendance. It seems to me that Statutory Bodies that use their

employees as ad hoc legal practitioners are taking a risk which they might sometimes
regret. The practice of law is a full-time occupation.

In the light of what I have said above, I feel I have to grant respondent's application for rescission of judgments. But as I am not particularly happy with applicant's manner of obtaining this default judgment, I feel obliged to order that each party should pay its own costs.

Rescission of judgment is granted, there is no order as to costs.

W.C.M MAQUTU
JUDGE

For applicant : Mr KT Khauoe
For respondent : Mr T van Tonder