CIV/T/498/01

# IN THE HIGH COURT OF LESOTHO

In the matter between

'M'ABERENG PHASUMANE — APPLICANT

vs

LESOTHO NATIONAL DEVELOPMENT CORPORATION — 1st RESPONDENT

MESSENGER OF COURT — 2ND RESPONDENT

## JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
On the 11th day of November 2002

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The applicant in this matter was a defendant in the main action. In that main action, this 1st respondent was the plaintiff. The 1st respondent is LESOTHO NATIONAL DEVELOPMENT CORPORATION – L.N.D.C. Applicant /defendant was employed by LNDC. She worked for LNDC for a period of approximately (20) twenty years. LNDC had staff housing scheme

policy. In 1997, the applicant/defendant entered into a staff housing scheme loan agreement with her employee LNDC. It was one of the terms of that loan agreement that the employer must lend and advance the applicant/defendant at her instance and special request, the sum of (48,646.06) forty-eight thousands and six hundred and forty-six lisente. This money was to be used for the purpose of purchasing plot N0.11294 – 753 situated at THETSANE in Maseru Urban Area.

Repayments of the said loan were to be effected by means of installments at the rate of three hundred and eighty-four maloti and sixty-nine lisente (384.69), for a period of fifteen (15) years and two months. Pursuant to their agreement applicant/defendant authorized LNDC to deduct the said monthly installments directly from her salary every month. As a last condition precedent to this loan, applicant /defendant freely and voluntarily pledged her terminal benefits arising out of her employment with LNDC **as security** in-favour of LNDC - should her job with LNDC be terminated.

Through no fault of hers on the 31st July 2001 LNDC terminated this applicant/defendant's employment because of and as a result of its restructuring policies. Prior to her departure from LNDC she signed an

acknowledgment of debt regarding the outstanding balance of her housing loan. Applicant/defendant agreed to repay that balance by means of monthly installments at the rate of (771.17) seven hundred and seventy-one maloti and seventeen lisente. It is apparent that she did not fulfil her obligations thereafter.

On 30th November 2001, the respondent/plaintiff issued out of this court summons against the applicant/defendant. In the said summons LNDC demanded the payment of the outstanding balance in that housing loan of this applicant/defendant. According to the applicant/defendant she promptly consulted her counsel – one Mr MAHASE who advised her that he will take steps to defend that action.(refer to the founding affidavit of applicant at paragraph 5.1)

Indeed Notice of INTENTION TO DEFEND was filed on 11th December 2001. On the 13th day of DECEMBER 2001 an application for summary judgement was filed together with the supporting affidavit deposed to by one LETUKA SEPHELANE who describes himself therein as a financial controller at LNDC. He averred that he can swear positively to the facts contained in the summons that the applicant/defendant is indebted to

the plaintiff/respondent as alleged. Reference was made to the loan agreement and acknowledgment of debt copies of which are attached to the summons.

The Notice of Set Down for the hearing of this application for summary judgment on the 25th day of March 2002 at 0930hours was served upon an received by the attorneys of the applicant/defendant on the 19th March 2002. There was no appearance by the applicant/defendant and her attorneys and/or counsel. Counsel for plaintiff/respondent appeared before court and applied for default judgment in the absence of the applicant/defendant. The applicant/defendant had not filed any opposing papers against this application for summary judgment. On the 26th March 2002 the Writ of Execution was issued to attach movable goods of this applicant/defendant.

According to the applicant/defendant this writ was served upon her by the deputy-sheriff on the 13th May 2002. The deputy-sheriff informed the applicant/defendant that judgement had been entered against her and that she was indebted to LNDC in the sum of twenty-eight thousands, seven hundred and forty-two maloti and eighty-two lisente(28,742-82). She claims that she

was surprised that judgment has been entered against her. Why? Because she was not advised of the hearing date of the case. She does not deny her indebtedness to LNDC.

It is her further averment that when she received the writ of execution she panicked. In her condition she went to the offices of her counsel Mr Mahase. She was unable to find him. Why? No reason is given. She then consulted her present attorney of record who instructed her to obtain withdrawal from Mr Mahase. Those are her exact words(see paragraph 8 founding affidavit)

She must have been lucky as appears that she was able to find her counsel and obtain the withdrawal as instructed by her present attorneys. She is now represented by them, she strangely enough seems to suggest at paragraph 9 of her Founding Affidavit that she came to learn from present attorney that summary judgment was granted against her. Earlier on at paragraph 6 of the same Founding Affidavit, applicant/defendant had claimed that the messenger of court informed her that judgment was taken against her and that she was indebted to LNDC to the tune of M28,742.82. The fact of her indebtedness was not new to her, he must have been well

aware of that fact. Why? Because she has referred to LNDC1 AND LNDC2 which are the LNDC Staff Housing Scheme Loan Agreement and an acknowledgement of debt, respectively. She does not deny signing both these documents. She does not deny receiving the loan amount from LNDC. She does not challenge the accuracy of the outstanding balance.

In terms of clause 9 of the parties agreement, the full amount of the loan or interest which remains unpaid on the due date becomes immediately due and payable. LNDC is entitled to recover the same together with all the costs and charges incurred in the recovery of the said amount.

It was on the 13th May 2002 when this applicant/defendant was served with the writ of execution. It was only on the 30th June 2002 that this application was filed ex-parte and on an urgent basis. As a result, an interim court order restraining the respondents from executing in terms of that writ was issued. It is one of her prayers in this application that the judgment obtained by LNDC against her be set aside.

Once the restraining order was obtained against the respondents, applicant/defendant sat back and did nothing. That interim court order

lapsed. She came back to court ex-parte again, applied for and was granted the revival order. Again that interim court order was allowed to lapse once more. The notes on the cover of the record show that the rule Nisi was revived and extended each time it had lapsed without any filing of a formal application. There are no reasons given why the Rule Nisi was allowed to lapse not once but twice. There are no reasons given for their revival everytime it was requested. This appears to have happened as a routine without a cause.

The Notice of INTENTION to oppose and an Opposing Affidavit were filed on 5th September 2002 and 10th September 2002 respectively. On behalf of the respondent/plaintiff a point **in limine** has been raised. It is submitted that the applicant/respondent should not have approached the court as a matter of urgency and ex-parte. The matter was not urgent.

In the first place the application does not comply with the rules of this court, which govern urgent application. Rule 8(22)(b), the relevant portion of this rule provides as follows:

> "In any petition or affidavit filed in support of an urgent application, (1)the applicant shall set forth in detail the circumstances which he avers render the application urgent and also the (2)reasons why

> he claims that he could not be afforded substantial relief in an hearing in due course if the periods presented by this Rule were followed."(My numbering and underlining to highlight those two requirements)

In the Founding Affidavit there are no averments made as required in terms of Rule 8 (22)(b). This rule requires the applicant in his or her affidavit to set forth in detail circumstances which he or she avers renders the application urgent. This applicant has set out in her affidavit nothing of that kind. Furthermore, the applicant is required to give reasons why she claims that he cannot be afforded substantial relief in a hearing in due course. These two requirements must be complied with in any affidavit filed in support of an urgent application. **LESOTHO UNIVERSITY TEACHERS AND RESEACHERS VS NUL. C OF A (CIV) NO 13/98. COMMANDER OF LESOTHO DEFENCE FORCE AND A.G. VS MATS'ELISO MATELA C OF A (CRI) NO 3/99 – C OF A CIV 504/98.**

This is an urgent application which was brought ex-parte accompanied by a certificate of urgency issued by Advocate Metlae who claimed in the said certificate amongst other things that applicant is likely to suffer irreparable harm without any grounds to show how and when that harm is to come by. By issuing this certificate for no good cause and totally

ignoring the requirements set out in rule 8 (22)(b) this behaviour provided the appropriate circumstances for awarding cost against the legal practitioner. **COMMANDER OF LDF(Supra).** This application was moved ex-parte and a **Rule Nisi** obtained, against the respondents on 19th July 2002. It was returnable on the 3rd August 2002. It was revived and extended on the 15th September 2002. The alleged nature of urgency of this application became confirmed as faked because once again the said rule was allowed to lapse. It was revived and extended on the 15th September 2002. The expiry and revival of the said rule Nile was taking place routinely. No formal application seemed to have been made at any particular time. No reasons or any explanation was given for this unbecoming behaviour of a legal practitioner. Despite numerous appeals over many years by the highest court on the land, that the practice of granting ex-parte court orders routinely must stop, the practice continues without any question being asked the legal practitioner requesting the same. Was there any justification for the issuing, reviving and extending of this rule nisi ? None is given. As a general rule as succinctly expressed by His Lordship Mr Justice GAUNTLETT JA, IN THE COMMANDER OF LDF(SUPRA), basic considerations of fairness and need to prevent the administration of Justice being brought into

disrepute require appropriate notice to be given. Otherwise there must be vigorous justification for proceeding ex-parte and on urgent basis.

After obtaining the said Rule Nisi on the 30th June 2002 nothing was done. The alleged urgency of the matter was thrown out through the window of the offices of the legal practitioner handling this matter, despite having issued the certificate of urgency. Days went by, weeks went by, the rule nisi lapsed time and again. This clearly is an indication of abuse of the process. The relaxed manner of the handling of this matter clearly demonstrates that this is not an urgent matter. Once a restraining order had been obtained ex-parte against respondents there was nothing further to be done as far as the applicant was concerned. But had the matter come to an end? The answer is, no. The applicant might here wished, but wishes are not horses. It is the 1st respondent who issued the notice of set down to have this application heard so that the restraining order granted against it without being given an opportunity to be heard may be finally confirmed or discharged. It is definitely not fair to approach the court ex-parte and obtain the restraining court order against the respondent and then sit back and do absolutely nothing. For none, compliance with the rule governing urgent applications, this application must fail.

The applicant does not deny her indebtedness to the respondent/plaintiff. She did not file opposing papers or appear at the hearing of the application for summary judgement despite their acknowledgment of the receipt of the Notice of Set Down for the same. In terms of the rules the party and his or her legal representative are one. Mr Mahase represented the applicant/defendant. Service upon him or his offices is service upon her client. If the applicant has a complaint regarding the manner in which her attorneys or counsel handled this matter the best solution for her is to approach an appropriate authority such as the Law Society. The failure to inform her about the date of hearing by her counsel is not a ground to apply to set aside the default judgment. The application has no merit.

Although this application was brought ex-parte and as an urgent application, it is in fact an application made in terms of rule 27(b) HIGH COURT RULES, Legal Notice no 9 of 1980. It falls for determination under this rule. The applicant in her founding affidavit at paragraph (7) alleges that she was surprised to learn of the judgment against her. Her counsel never informed her of the date of hearing nor anything that matters

default. If this is the application that must be considered in terms of rule 27(b) High Court rules(Supra) it should have been filed on notice. This application did not come before court on notice to respondents. The party applying to have the judgment set aside must furnish security to the satisfaction of the registrar for the payment to the other party of costs of the default judgment. There is no averment that such security was paid.

There is no rule of this court that this application can be said to have complied with. Therefore, it must fail. It is dismissed with costs.

**K.J. GUNI**
**JUDGE**

**FOR APPLICANT - MR. METLAE**
**FOR RESPONDENT - MR. POOPA**