CIV/T/287/90
CIV/APN/ / 97

IN THE HIGH COURT OF LESOTHO

In the application of:

PITSO MALUNGA — Applicant

and

STANDARD CHARTERED BANK AFRICA PLC — 1st Respondent
DEPUTY SHERIFF — 2nd Respondent

Judgment

Delivered by the Honourable Mr. Justice B.K. Molai
on 31st day of October, 2002

The applicant herein moved the court *ex-parte* for, and obtained, a *Rule nisi* calling upon the respondents to show cause (if any) why:

"1 (a) Execution of judgment - against applicant herein shall not be stayed pending the finalization of this application;

(b) Judgment obtained by default in CIV/T/287/90 by the 1st respondent herein shall not be rescinded;

(c) The respondents shall not be directed to pay costs hereof only in the event of opposition thereto;

(d) Rules as to service and notice shall not be dispensed with on account of urgency;

(e) Applicant shall not be granted such further and/or alternative relief.

2. That prayers 1 (a) and (d) operate with immediate effect as an Interim Order."

The application was opposed by the 1st respondent. The 2nd respondent intimated no intention to oppose the application. It may safely be assumed, therefore, that the 2nd respondent will abide by whatever decision will be arrived at by the court.

It is, perhaps, necessary to mention, by way of a background, that in August 1990, 1st respondent, as Plaintiff, filed, with the Registrar of the High Court, summons commencing an action in which it, *inter alia,* claimed, against the applicant, as defendant, payment of the amount of M392,958-25 which the former had advanced to the latter, as overdraft facilities. The payment of the overdraft facilities which 1st respondent/plaintiff had, from time to time, been advancing to applicant/defendant was secured by way of certain deeds of Hypothecation registered in favour of the former in the office of the

Deeds Registry, Maseru, under the Deeds Registry Act of 1967. The Deeds of Hypothecation were annexed and, *inter alia,* stipulated that the amount of indebtedness to the 1st respondent/plaintiff at any time secured under the Deeds of hypothecation would be determined and proved by a certificate signed by the manager or accountant of the 1st respondent/plaintiff and such certificate would be conclusive proof of the amount of the said indebtedness. The certificate was duly signed by the chief manager of 1st respondent/plaintiff as proof of the amount of indebtedness owed by the applicant/defendant. Notwithstanding 1st respondent/plaintiff's demand of payment of the amount due, owing and payable by the applicant/defendant, as of 18th April 1990, the latter failed, refused and/or neglected to pay. Wherefore, 1st respondent/plaintiff prayed for judgment, as claimed in the summons.

On 29th August 1990 applicant/defendant served a notice of appearance to defend upon the 1st respondent/plaintiff who, however, filed, with the Registrar of the High Court, an application for summary judgment on the ground that the former was indebted to the latter as claimed in the summons and the notice of appearance to

defend was entered merely for purposes of delay. The applicant/defendant successfully opposed the application for summary judgment.

After the pleadings had been closed, the matter was enrolled for hearing. However, on 29th March 1996 and before the hearing of this matter could be completed, Mr. Redelinghuys, who had all along been representing the applicant/defendant, withdrew as his attorney of record. It is, however, significant to observe that before he withdrew as the attorney of record for the applicant/defendant, Mr. Redelinghuys had received two notices of set down both dated 12th December 1995. One was notifying him that the case had been set down for hearing on Monday 5th August 1996 and Tuesday 6th August 1996. The other was notifying him that the case would also be heard on 21st and 22nd August 1996.

When on 5th August 1996, the court convened to continue with the hearing of the case, only the 1st respondent/plaintiff's lawyers and his witness were in attendance. Neither the applicant nor his legal representative were in attendance. In view of the fact that the

applicant/defendant had, through the office of the then his attorney of record, Mr. Redelinghuys, been clearly served with the notice of set down, dated 12th December 1995, the 1st respondent/plaintiff applied for judgment by default. However, the court did not know whether or not when, on 29th March 1996, he withdrew as his attorney of record, Mr. Redelinghuys had handed the file of the case to the applicant/defendant. If Mr. Redelinghuys had handed the file to the applicant/defendant, then the latter was aware, from the file, that the hearing of the case was to continue on 5th August 1996. But if Mr. Redelinghuys had not handed the file to him, the applicant/defendant was, in all probabilities, unaware that the hearing of his case was to continue on 5th August 1996. Hence the reason why neither the applicant/defendant nor his new legal representative could not be in attendance on that day, 5th August 1996. The Court had a doubt, the benefit of which was given to the applicant. Consequently, the application for default judgment was turned down.

As the applicant/defendant and his new legal representative were not in attendance on 5th August 1996, there was no hope that

they would be in attendance on the following day, 6th August 1996, in accordance with the notice of set down dated 12th December 1995. There was, therefore, no point in postponing the hearing of the case to the following day, 6th August 1996. They would still be not in attendance. In the circumstances, the court had no alternative but to postpone the hearing to 21st August 1996, the date on which the case was next set down for hearing, in terms of the second notice of set down, dated 12th December 1995.

For the benefit of the applicant/defendant the court ordered the Registrar of the High Court, in her capacity as the sheriff, to make sure that he (applicant/defendant) was, in the mean time, served with copies of all notices of set down that had been sent to Mr. Redelinghuys prior to his withdrawal as applicant/defendant's attorney of the record, copy of Mr. Redelinghuys' notice of withdrawal as applicant/defendant's attorney of record and in particular inform the applicant/defendant that he and/or a legal representative of his choice (if any) should attend court on 21st August 1996, the date on which the hearing of his case would continue, in accordance with the second notice of set down, dated 12th December 1995.

The Deputy Registrar of the High Court, 'Makampong Gugu Sello, in her capacity as the sheriff, filed an affidavit of Return of Service in which she deponed that on the following day, 6th August 1996, she had proceeded to applicant/defendant's residence at a place called Lithabaneng, here in Maseru. She found the applicant/defendant himself not in. She, however, found two (2) of the applicant/defendant's employees namely, 'Maseabata Tšiane and 'Mataelo Shea who were both apparently above the age of 16 years. As directed by the court, the Deputy Registrar did serve on them copies of the notices of set down for the 5th, 6th, 21st and 22nd August 1996, all of which notices had been sent to Mr. Redelinghuys, prior to his withdrawal as applicant/defendant's attorney of record. She also served, on the two (2) employees, a copy of Mr. Redelinghuys' notice of withdrawal as applicant/defendant's attorney of record, as well as a copy of notice of set down, dated 4th June 1996, for the 10th, 11th and 12th December 1996 which copy of set down had been served at the applicant/defendant's residence on 29th July 1996.

It would also appear that after the court proceedings, on 5th August 1996, Mr. Harley, 1st respondent/plaintiff's attorney of record,

addressed, to the applicant/defendant, a letter in which he clearly explained, to the latter, the full position of the case. The letter reads, in part:

"5th August 1996,

Dear sir,

re: Standard Chartered Bank Africa Plc vs Mr. P.P. Makhoza - CIV/T/287/90

We refer to the above mentioned matter.

(a) Background

(1) The case against you under the above mentioned case number has been proceeding since 1990;

(2) Your attorney, Mr. S.A. Redelinghuys of Messrs S.A. Redelinghuys and Co., withdrew as Attorney of Record on the 29th day of March 1996.

(3) On the 18th day of January 1996, your attorney was served with a notice of set down, setting the matter down on Monday the 5th and Tuesday the 6th August 1996 and on the same day a further notice of set down for Wednesday the 21st and Thursday the 22nd August 1996 was served, copies of which are attached hereto, in the bundle of documents.

(4) Thereafter, further notices of set down were served upon you by a clerk in the employ of

Messrs Harley and Morris Associates, Mrs Maseapane Moshoeshoe for the following dates in December 1996 - 10th, 11th and 12th December 1996. Her affidavit in regard to service of these documents are also enclosed in the bundle of documents, attached hereto, together with the Notice of set down.

(5) You were also served with a Rule 39 (2) Notice in respect of the dates for August and December 1996.

(B) Events of Court on the 5/8/96

(1) This matter duly came before the High Court of Lesotho on Monday the 5th August 1996, with Judge Molai presiding.

(2) You were absent from the court on that day and the Judge directed that all the documents in the attached bundle herein, being copies of all notices of set down a copy of the notice of withdrawal, copies of all affidavits of service filed and a copy of the plaintiff's affidavit in respect of the notice in terms of Rule 36 (6) (8) and (11), be served in terms of the Rules of the High Court and to further advise you that this matter will not proceed on the 6th August 1996 but will proceed, as per the two notices of set down, in respect of the dates of the 21st and 22nd August 1996 and the 10th, 11th and 12th of December 1996.

(3) The Judge further directed that you are expected to appear at court on the 21st and 22nd August 1996 in person, or represented, failing which default judgment will be granted against you in this part-heard

matter.

Yours faithfully

Harley and Morris Associates."

In her affidavit of Return of Service, the Deputy Registrar deposed that when she came to applicant's residence, on 6th August 1996 she also served copy of the above cited letter, together with the annexures thereto, on the applicant/defendant's two (2) employees. Consequently, when, on 21st August 1996, the court convened to continue with the hearing of his case, the applicant/defendant was admittedly personally in attendance. He had, however, not brought a lawyer to represent him. According to him, the applicant/defendant was still in the process of engaging the services of another lawyer to represent him in this case.

It is to be borne in mind that Mr. Redinghuys withdrew as applicant/defendant's attorney of record on 29th March 1996. The applicant/defendant had, therefore, five (5) months within which he could have engaged the services of another lawyer, if he really intended to do so. He had not done so. Nonetheless, the court gave

the applicant/defendant a further 30 days within which to find a lawyer of his choice to represent him and told him that in accordance with the notice of set down, dated 4th June 1996, of which copy had been served on him by the office of the 1st respondent/plaintiff and the Deputy Registrar on 29th July 1996 and 6th August 1996, respectively, the hearing of his case would be continued on 10th December 1996 when he and/or his new legal representative should, therefore, attend court without fail.

Notwithstanding the fact that he had, on 29th July 1996 and 6th August 1996, been served by the office of 1st respondent/plaintiff and the Deputy Registrar of this court, respectively, with notice of set down advising him that the hearing of his case would be continued on 10th December 1996 and, indeed, the court had verbally told him so, on 21st August 1996, the applicant/defendant chose not to attend court on that day. Consequently, 1st respondent/plaintiff applied for judgment by default, on the ground that the applicant/defendant was no longer interested in the hearing of the case being continued to a finality. The court was, in the circumstances, unable to find any justification to refuse the application. Judgment was accordingly

entered, against the applicant/defendant, by default, in terms of the prayers in the summons.

The applicant/defendant did nothing about the default judgment until on 9th May 1997 when he was served with a writ of execution. It was only then that he filed, with the Registrar of the High Court, the present urgent application in which he moved the court for, and obtained against the respondents, the rule nisi as aforesaid. The application is opposed by the 1st respondent. The 2nd respondent has intimated no intention to oppose the application. It may, therefore, be safely assumed that he is prepared to abide by whatever decision the court will arrive at.

Affidavits have been duly filed by the parties. In as far as it is relevant, the applicant concedes, in his founding affidavit, that he did not attend court on 10th December 1996 when judgment was granted against him by default. The reason therefor was because he had never been made aware that the hearing of his case would be continued on the day in question, 10th December 1996. The first time he became aware that the hearing was continued and judgement entered against

him on 10th December 1996 was when he was admittedly served with the writ of execution on 9th May 1997.

In the answering affidavit, the 1st respondent denied the applicant's averment that he had not been made aware that the hearing of his case would be continued on 10th December 1996. A copy of a letter (annexure "C1") addressed to the applicant on 5th August 1996 was attached to the answering affidavit. 1st Respondent prayed, therefore, that the application be dismissed with costs on attorney and client.

According to annexure "C1", on 18th January 1996 applicant's former attorneys of record, Messrs S.A. Redelinghuys & Co. were served with two notices of set down both evenly dated 12th December 1995. The first notice set down the applicant's case for hearing on 5th and 6th August 1996 whilst the second one, again, set it down for hearing on 21st and 22nd August 1996.

However, on 29th March 1996 Messrs S.A. Redelinghuys & Co. withdrew as applicant's attorneys of record. On 20th May 1996 and

following the withdrawal of Messrs S.A. Redlinghuys & Co., the 1st respondent served copies of the above mentioned two notices of set down, dated 12th December, 1995, on the applicant. An affidavit of Return of Service was deposed to by 'Maseapane Moshoeshoe who averred that she had effected personal service on the applicant himself. On 29th July 1996 the 1st respondent served on the applicant another notice of set down dated 4th June 1996 by which the hearing of the applicant's case was to be continued on 10th, 11th and 12th December 1996. An affidavit of Return of Service was again deposed to by 'Maseapane Moshoeshoe who averred that she had effected service by handing the notices of set down (together with an affidavit of one S.L. Rahlao) to applicant's wife at their place of residence in Lithabaneng, here in Maseru.

When, on 5th August 1996, the court convened to continue the hearing of the case, Messer S.A. Redelinghuys & Co. were, for obvious reasons, not in attendance. Although on 20th May 1996 he had been personally served with copy of the notice of set down advising him that the hearing of his case would be continued on 5th August 1996, the applicant failed to attend court on the day in question. There was no

hope that on the following day, 6th August 1996, the applicant would come to court because he had given no reason why he could not attend on 5th August 1996. The Court had to postpone the case to 21st and 22nd August 1996, the dates for which it had already been set down for hearing, in terms of the second notice of set down, dated 12th December 1995. To make sure that the applicant was aware that the hearing of his case would be continued on all the dates set aside for that purpose, the court instructed the Registrar of the High Court, in her capacity as the sheriff, to serve the applicant with copy of the pleadings including copies of annexure "C1" and the notices of set down dated 12th December 1995, 4th June 1996, as well as the affidavits of Returns of Service deposed to by 'Maseapane Moshoeshoe. The Return of Service was filed by the Deputy Registrar of the High Court, 'Makampong Gugu Sello, who deposed to the affidavit of Return of Service in which she averred that, on 6th August 1996, she and a certain No. 9031 Tpr. Tšiu had proceeded to the residence of applicant at Lithabaneng, here in Maseru. The applicant was not in. They, however, found applicant's two employees *viz.* 'Maseabata Tšiane and 'Mataelo Shea. The apparent ages of the two employees were above 16 years. As instructed by court, the Deputy

Registrar then effected service.

It is significant to mention that when the court convened, on 21st August 1996, the applicant was in attendance. There is, therefore, no doubt in my mind that, on 6th August 1996, the Deputy Registrar did, indeed, serve him as she had been instructed by the court, on 5th August 1996. However, on 21st August 1996 only the applicant attended court. He did not come with a legal representative. In his explanation, the applicant was still in the process of finding a legal practitioner who would represent him.

It is to be observed that the applicant's former attorneys of record, Messrs S.A. Redelinghuys & Co., withdrew from the case as far back as 29th March 1996. Applicant had, therefore, more than four (4) months to engage the services of another lawyer, if he really wished to do so. He did not do so. However, the court was inclined to lean in favour of the applicant. It postponed the case to 10th December 1996, the date to which it had already been set down for hearing, in terms of the notice of set down, dated 4th June 1996.

On 21st August 1996, the court specifically told the applicant, that he was given 30 days within which to engage the services of a new lawyer who would then have had sufficient time to prepare to represent him on 10th December 1996. However, when on 10th December 1996 the court convened to continue with the hearing of the case, only the 1st respondent and its legal representative were in attendance. Neither the applicant nor his legal representative showed up. In the circumstances, the 1st respondent applied for judgment by default on the ground that the applicant was clearly not interested in the case coming to a finality. Regard being had to the fact that the applicant was, on 29th July 1996 and 6th August 1996, clearly served with the notice of set down, dated 4th June 1996, advising him that the dates of 10th , 11th and 12th December 1996 had been set aside for the hearing of his case and, indeed, on 21st August 1996 the court verbally told him he was given 30 days within which to engage the services of a lawyer who would be ready to represent him when the case came for hearing on those days (10th, 11th and 12th December 1996), there was no doubt in my mind that he was sufficiently made aware that the hearing of his case would be continued on 10th December 1996. The applicant was, therefore, simply not being honest with the court in his

averment that he had not been made aware that his case was set down for hearing on 10th December 1996.

It may be mentioned that in his affidavit, the applicant averred that he was further misled by the fact that in October 1996 he was also served with a notice of set down (dated 3rd October 1996) setting the case for hearing on the 5th and 6th August 1997, the 16th and 17th October 1997 and the 4th and 5th November 1997. There was no mention that the case would also be heard on 10th December 1996.

It may, perhaps, also be noted that on 24th September 1996 the applicant was served with a notice, in terms of the provisions of rule 39 (2) of the High Court Rules 1980, advising him that 1st respondent would, on 30th September 1996, approach the office of the Registrar of the High Court with a request for the allocation of further dates on which the hearing of the case would be continued. In terms of the provisions of rule 39 (3) the applicant was entitled to attend at the office of the Registrar on 30th September 1996 in order that he might raise any objection to the dates of hearing proposed by the Registrar. However, on 30th September 1996, the applicant chose not to attend at

the office of the Registrar who then allocated, *inter alia,* the 5th and 6th August 1997 as the dates on which the hearing of the case would be continued. On 10th October 1996 the applicant was accordingly served with the notice of set down, dated 3rd October 1996. Affidavit of the Returns of Service was deposed to by 'Maseapane Moshoeshoe who deponed that she had proceeded to the residence of applicant at Lithabaneng and effected service by leaving copy of the notice in terms of the provisions of rule 39(2) of the High Court Rules 1980 and copy of the notice of set down dated 3rd October 1996 with applicant's wife, 'Mathabo, on 24th September 1996 and 10th October 1996, respectively. Had he attended the office of the Registrar of the High Court on 30th September 1996 as he was invited to do, in terms of the provisions of rule 39 (3) of the High Court Rules 1980, the applicant would, in my view, have known that the notice of set down, dated 3rd October 1996, was in addition to the notice of set down, dated 4th June 1996. It did not supersede it. The applicant cannot fail to honour the invitation to attend at the office of the Registrar of the High Court on 30th September 1996 when the notice of set down, dated 3rd October 1996, was arranged and then be heard to say the notice of set down misled him. That being so, the applicant's default to attend court on

10th December 1996 was, in my opinion, quite wilful. The application made by the 1st respondent for judgment by default was, for that reason, granted.

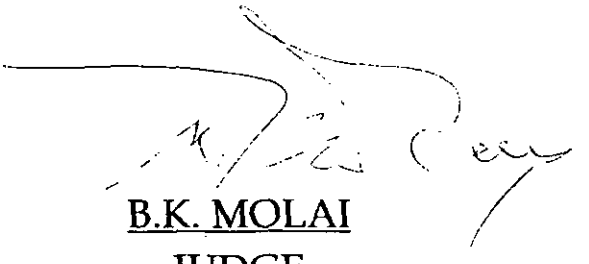
It is worth noting that, under prayer 1 (b) of the notice of motion, the applicant clearly applies, *inter alia,* that the default judgment granted against him, on 10th December 1996, be rescinded or set aside. However rule 27 (6) (b) of the *High Court Rules 1980* clearly provides:

> "27(6)(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 (sic) of such judgement."
> (My underlining)

I have underscored the word "*must*" in the above cited rule 27 (6) (b) of the *High Court Rules 1980* to indicate my view that the provisions thereof are mandatory. In the present case, there is, however, no indication that the applicant has complied with the provisions of rule 27 (6)(b) of the *High Court Rules, supra.*

The applicant cannot, in my view, wilfully disregard his obligations under the rules of this court and then expect the court to come to his assistance by applying for rescission of the default judgment granted against him (Ford vs S.A. Mineworkers Union 1925 T.P.D. 405 p 406).

In the result, prayer 1 (b) of the notice of motion ought not to succeed. That, in my view, disposes of the whole application and it would be merely academic to proceed to deal with the other prayers in the Notice of Motion. The interim order is discharged and the application accordingly dismissed with costs on attorney and client scale, as prayed by the 1st respondent.



B.K. MOLAI
JUDGE
31st October, 2002

For Applicant : Mr. Phafane

For Respondent : Harley & Morris