CRI/A/14/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOLAHLEHI JACK APPELLANT

and

REX RESPONDENT

JUDGMENT

Delivered on 22nd Day of February 2002 by the Honourable
Mrs Acting Justice A.M. Hlajoane

This is an appeal from the Magistrate's Court Maseru. The Appellant, a young man who was then 27 years old in 2000, was charged and convicted of assault common . He has been sentenced to three years imprisonment.

It was a pathetic case because the appellant is the son to the complainant in

this case. The Appellant is alleged to have assaulted his own father by hitting him with a stone on the forehead.

From the record of this case one could gather that the relations between the Appellant and his parents were not cordial. It came out in evidence that P.W. 1 who is the Appellant's father, had approached Appellant at his home, as they lived at different places. Appellant said it was on the day of the assaults but P.W. 1. said it was some other day prior to that. P.W. 1. went there to collect his basin and bucket. The Appellant did not approve of this collecting of basin and bucket. As a result the Appellant too felt that he should collect what belonged to him which was still in the possession of his parents. Appellant went to his parents' home to tell them to bring back the money he had asked them to pay for him at the union. It appeared appellant's mother used to attend meetings for the union on his behalf so that he felt, there was no one who will attend the meetings for him as they had quarrelled.

Not only did Appellant ask for his money, he also went to the kraal and drove away his three (3) sheep from his parents' home.

In most parts the evidence of the Appellant was supported by his brother,

Bereng who was D.W.2 at the trial and her mother who was P.W. 2 at the trial. The relevant portions were where even before the fight, P.W1 told Appellant to leave them and he did. They were inside the house and they prevented P.W.1 from following Appellant by closing the door. But a short while later P.W.1 went out and immediately they heard D.W.2 telling P.W.1 to leave the Appellant. P.W.1 also did not dispute that he was armed with an iron rod. They could not only agree as to where P.W. 1 collected the iron rod. Appellant said it was from another house whilst P.W.1 said he found it outside the house. Initially P.W.1 did deny that he hit appellant with that iron rod but eventually admitted under cross examination. It has also been P.W.1's evidence in chief, that D.W.2 came and asked him to leave the Appellant.

The Appellant has appealed against both the conviction and the sentence. And what is most interesting is that the Respondent does not support the conviction and sentence in this case. She submits that if anything, the Appellant could have been given a benefit of a doubt or alternatively , if convicted, given a sentence with an option of a fine.

It has further been the Crown's submission that in fact conviction should be based on legalistic and not moralistic issues. Here she supported the submission

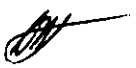
by the Appellant that the trial Court had been influenced by inadmissible events of the past and as a result made a moral judgment. The trial Court concluded that the Appellant was not respecting his parents as he was alleged to have pointed a gun at P.W. 1 sometime in 1999.

From the record it appeared that in fact the complainant is the one who rushed at the Appellant. Was the Appellant then not entitled to defend himself? Or could it then be said he exceeded the bounds of self defence merely because the complainant was his father? The answer is no. The Appellant was exercising his right of self defence. **Rex vs Molato 1974-75 LLR 30.** The trial Court has given no reasons for believing the evidence of the complainant over that of the Appellant. On looking at the evidence as a whole the story of the Appellant was reasonably possibly true as supported by complainant himself, P.W.2 and D.W.2 **Rex vs Chitja 1991-96 vol 2 LLR 963.** Because the trial Court has failed to give reasons for arriving at its decision by believing the complainant's story the Court on Appeal is therefore at large to decide otherwise. **Lesaoana and Others vs Rex 1955 HCTLR at 36D.**

Now considering the sentence that was imposed, there were no reasons given for having passed a sentence of three years imprisonment. In **Mojela vs Rex**

1977 321, Mofokeng J. as he then was , stated that "This Court has said before that it is of paramount importance that an accused person should know the reasons for the imposition of his sentence. These reasons must not be stated after the accused has noted an appel but when the sentence is actually being imposed."

The Magistrate may have been shy to state, as concluded by the Crown, that he based his judgment on moralistic values. I am not also trying to pity the situation, but on the facts of this case, feel obliged to alter the decision. The Appeal is therefore upheld, the conviction and sentence are set aside and the accused found not guilty and discharged.



A.M. HLAJOANE
ACTING JUDGE

For Appellant: Ms M. Ramofole

For Respondent: Ms H. Motinyane

CIV/APN/102/01

IN THE HIGH COURT OF LESOTHO

In the matter between:

BASIA MAHALEFELE — **Applicant**

and

LESOTHO BANK — **1st Respondent**
DEPUTY SHERIFF — **2nd Respondent**

For the Applicant: **Sethathi & Co.**

For the Respondents: **Mr. S.C. Buys**

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 19th day of February 2002

I agreed that the application ought to be dismissed with costs inasmuch as Applicant/Defendant's Counsel did not prosecute it to an end.

The Applicant applied for an order in terms whereof the execution scheduled for the 2nd March 2001 was stayed. The Applicant further applied for rescission of judgment and to be granted leave to defend the proceedings instituted against him under CIV/T/250/00.

Proceedings were filed in this Court against the Applicant who was Defendant on the 25th August 2000. Judgment was granted by default on the 11th September 2000 against the Defendant who had instructed Counsel with a view to settle (as he admitted liability) to no avail.

It was quite clear that an application of this nature by the Applicant should and should have complied with the provisions of Rule 27(6) of the High Court Rules, which provides for time limits within which to apply to set aside the given judgment, and the fixing of security.

The First Respondent contends in his opposing affidavit that the Applicant was already aware of the judgment on the 4th October 2000 when a warrant of execution against movable assets was served upon him. He responded by simply informing the Deputy Sheriff that he does not have attachable movable assets.

Twenty days has therefore expired within which the Applicant was supposed to bring an application and in the circumstances the failure to do so was fatal as I concluded.

In addition thereto the Applicant has failed to comply with Rule 27(6)(b) in that no security has been furnished to the satisfaction of the Registrar of the High Court for the payment to the First Respondent of its costs for the default judgment. The furnishing of security is mandatory and failure to do so is fatal to the application. See **Ramdaries v Mafaesa** CIV/T/56/83 delivered on the 25th May 1983 by Cotran CJ.

There was also evidence before this Court, in the form of correspondence between the Applicant's Attorneys, that the Applicant admitted liability and offered to pay the debt by way of monthly instalments. Because an agreement could not be reached in this regard the First Respondent proceeded (as it was entitled to) with the execution against immovable property. The First Respondent argued that there was no good cause for the default judgment to be set aside as is provided for in Rule 27(6)(c), which reads as follows:

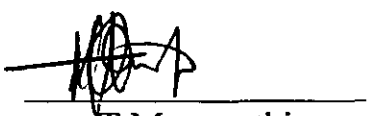
"At the hearing of the application the Court may refuse to set aside

the judgment or may on good cause shown set it aside on such terms including any order as to costs as it thinks fit."

The Applicant did not show good cause on which the judgment may be rescinded. This attitude was strengthened by the fact that the Applicant has admitted liability.

There would therefore be no sense in setting aside the judgment as there would be nothing to try before this Court once the judgment was set aside. This in my view would be waste of time and money where the Applicant was not able to show that he had a *bona fide* defence to First Respondent/Plaintiff's claim. See **Grant v Plumbers (Pty) Ltd** 1949(2) SA 470(O).

In the circumstances the application for rescission was dismissed with costs.



T Monapathi
Judge

19th February, 2001