CIV/T/344/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:-

BARLOWS CENTRAL FINANCE CORP. RESPONDENT

and

THESE CONSTRACTION SERVICES
(PTY) LTD APPLICANT

JUDGEMENT

Delivered by the Honourable Mrs. K.J. GUNI
on the 3rd June, 2002

It is in the common cause that this applicant/defendant was served with the summons on the 16th June 2000. Upon receipt of the said summons the defendant/Applicant approached the attorneys of the plaintiff/respondent. The parties must have discussed the matter. The defendant/applicant agreed that the plaintiff should repossess the machine – the subject matter of the parties' agreement of sale for the

breach of whose terms the defendant/applicant was being sued in the said summons.

The machine was duly repossessed according to the applicant. No date for the said repossession is mentioned. On the 25th June 2001, the defendant/applicant was once again served with the process. This was a writ of execution for an amount of M428 813.43. Defendant/applicant claims that this came as a surprise. Why? It seems he regarded the surrender of the machine as the end of the matter.

On the 11th July 2001, an urgent and exparte application was filed with this court on behalf of the defendant/applicant. The Rule Nisi was sought and obtained in the following terms:-

(a) Dispensing with the normal modes of service due to the urgency of this matter.

(b) Staying the execution of the writ of execution issued in CIV/T/344/2000 date 25th June, 2001.

(c) Rescinding and setting aside judgement granted by default on 21st day of November 2000 as having been granted by mistake or error.

(d) Granting Applicant costs in the event of opposition.

(e) Granting such further and/or alternative relief.

The plaintiff/respondent opposes the confirmation of the rule Nisi so issued. The following point in limine have been raised on behalf of the plaintiff/respondent.

(1) LACK OF URGENCY.
(2) EX-PARTE.
(3) SECURITY
(4) WILFULL DEFAULT

URGENCY.

The urgent applications before this court are governed by rule 8.(22) (a) (b) (c) HIGH COURT RULES, Legal Notice N0.9 of 1980. The relevant portion to the matter under consideration is Rule 8.(22) (b). It provide as follows:-

> *"In any petition or affidavit filed in support of an urgent application, the applicant shall set forth in detail circumstances which he avers render the application urgent and also the 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."*

There are two requirements which every urgent application must fulfil. Firstly, in the founding Affidavit the deponent must set forth in detail circumstances which he evers render the application urgent. Secondly the deponent must give reasons why he claims that he cannot be afforded substantial relief in a hearing in due course. Compliance with this rule is obligatory. LESOTHO DENTAL and PHARMACY COUNCIL V MUSOK CIV/APN/100/93, LESOTHO UNIVERSITY TEACHERS AND RESEARCHERS UNION V NATIONAL UNIVERSITY OF LESOTHO C of A (CIV) NO13/98 (unreported). The perusal of the founding Affidavit reveals no averments setting out those circumstances which could possibly show this court that this application is urgent. In the replying affidavit the question of urgency is very casually referred to almost in passing. Perhaps it is because at the replying stage, it is already too late as those averments should have been made in the founding affidavit. It is wrong to believe that the mere service of the writ of the execution or an averment that the applicant was served with the writ of execution conver on the receipient thereof the right to approach the court by means of an

urgent application but with total disregard for the rules governing urgent application.

For its failure to comply with rule 22. (HIGH COURT RULES. Supra) this application must fail.

The applicat filed this application ex-parte and obtained a court order without giving notice to the respondent. In the founding affidavit, there are no avernments justifying the seeking and obtaining of the said court order behind the respondent's back. It is a shame, that counsel approached the judge and sought and obtained the said court order as a matter of a normal routine. This order was a direct interference with the respondents' right. It is sought and granted without given the respondent an opportunity to be heard and most of all without that rigorous justification which would take the matter out of the normal routine. In a civilised society which prides itself as being democratic, interference with other people's rights without first giving them notice of the intended interference, must not be tolerated.

In the founding affidavit filed in support of this urgent application, there are no avernments which indicate that the respondent was likely to interfere with the court order sought and thereby defeat its intended purpose. The question of urgency would not support proceeding without giving notice to the respondent because the writ of execution was received on the 25th June 2001. This application was filed about two weeks later, on the 11th July 2001. There was ample time to give the respondent the notice. The parties may have even resolved the matter without coming to court. When the applicant was served with the summons, he approached the plaintiff/respondent's attorneys. Why did he not do the same this time? There was not justification for applicant/defendant to approach the court ex-parte. No attempt was made in the founding affidavit to justify seeking the court order ex-parte. Without justification the rule Nisi sought should not have been issued. LESOTHO DEFENCE FORCE AND A.G. V MATSELISO MATEA C of A (CRI) 3/99. The confirmation of the said rule must therefore fail.

SECURITY

On the face of it, this application does not specify that it is made in terms of Rule 45 HIGH COURT RULES, Legal notice N0.9 of 1980. In his heads of argument, the attorney for the applicant/defendant points out that this application for rescission of judgement is made in terms of Rule 45 High Court Rules (Supra). This rule provides for variation and rescission of orders and judgements. The rule sets out circumstances under which orders and judgements may be varied or rescended. This application according to Mr. Matooane, is for correction of a patent error or errors. This falls directly under Rule 45 (1) (b). It reads as follows;-

> *"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.....*
>
> *(a).....*
>
> *(b) an order or judgement in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, or omission,".....*

When approaching the court for this type of relief, argues, Mr.Matooane, the party seeking rescission of judgement, is not obliged to pay security. The issue of cost in applications for rescission of judgements, is dealt with in Rule 27 (6) (b) – HIGH COURT RULES. (Supra). The relevant portion thereof read as follows:-

> *"the defendant may within twenty-one days after he has knowledge of such judgement apply to court, on notice to the other party, to set aside such judgement.*
>
> *(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 judgement and of the application for rescion of such judgement".*

This application is completely against the words and spirit of this ruie. It was filed without notice to the respondent and without the required security for costs. Refuge was sought and found in Rule 45 High Court rule (supra). This was in fact a false shelter. When the examination was made on the papers to ascertain the correctness of the assertion that rule 45 will accommodate the application it was discovered that there is no room for this application. Why? Rule 45 (2) High Court rules (supra) provides that:-

> *"Any party deserving any relief under this rule shall make application thereof upon notice to all parties whose interests may be affected by any variation sought". (My underlining)*

This application was not made on notice to the respondent. The word used in Rule 45 (2) is "shall". That means that the making of the application on notice is obligatory. It cannot be made ex-parte. The respondent is a judgement creditor. The writ of execution referred to by the applicant is issued out pursuant to the default judgement granted to this respondent/plaintiff. Respondent/Plaintiff must certainly be as interested in the rescission of that judgement as it was in its enforcement. The applicant/defendant sought and obtained an interim court order setting it aside. In terms of this rule 45 (3) High Court rule (supra) that was improper because the applicant had not given notice to the respondent.

This rule does not only give directions to parties seeking relief, it also directs the court that is considering the granting of the relief/sought. Rule 45 (3) provides that:-

> *"The court shall not make any order rescinding or varying any order or judgement unless*

satisfied that all parties whose interests may be affected have notice of the order proposed".
(My underlining)

The court in this case was aware that the application was made without notice to the respondent. The granting of the interim order in the circumstances was improper. For this total disregard of the rules of this court this application must fail. It does not comply with rule 45 nor 27.

WILFUL DEFAULT

The applicant/defendant admits receiving the summons. In the founding Affidavit applicant avers that he approached the attorneys of the plaintiff/respondent. They must have discussed the case because he goes on to claim that he agreed that the plaintiff/respondent should repossess the machine. He does not aver as to other and further steps he took to protect his interests. He knew that there was an action brought against him. He did whatever he wanted to do. He refrained from doing whatever he does not wish to do. That included entering an appearance to defend the action. Even at this stage the applicant has not attempted to explain his default. This lead

invariably to the conclusion that he knew what he was doing, intended what he was doing. CHECKBURN V BARKETT 1931 CPD 423, NEWMAN V AYTEN 1931 CPD 454.

Trying to decide this matter on the consideration of the established grounds and rules for rescission of judgement seems a waste of time because the applicant herein has complied with none of such grounds and rules. The counsel for applicant/defendant insists that they are seeking the relief in terms of rule 45 HIGH COURT RULES.

The error which the applicant/defendant wishes this court to correct is with regard to the attorneys of the plaintiff/defendant. Applicant claims that Webber and Newdigate even though they claim to be attorneys of record of this respondent/plaintiff they are not. Who would know better? The applicant/defendant went to consult with the attorneys of the plaintiff/respondent when he received summons issued out of this court by those attorneys. Why did he not go to Singer and Horwitz. His conduct provides an answer to his

quiry. By his conduct he clearly acknowledged the fact alleged in the answering affidavit that Webber and Newdigate are the attorneys of the respondent/plaintiff. He dealt with them as such. He cannot turn round to claim that they are not.

With regard to the amount claimed in the summons and attendant ambiguity the parties at last seemed to have resolved the arithmetical error. The figure arrived at except that it was at the much later stage rather than in the summons is not disputed. This issue regarding the amount claimed does not fall for determination. The amount arrived at in the Answering affidavit seems acceptable to the defendant/applicant.

The respondent/plaintiff has succeeded in its opposition to the granting of this application. The rule Nisi issued out by this court is therefore discharged with costs.

K.J. GUNI
JUDGE

For applicant - Mr. T.M. Matooane
For respondent - Messrs. Webber Newdigate