CIV/T/116/96

IN THE HIGH COURT OF LESOTHO.

IN THE MATTER BETWEEN: -

THOLOANA MOTSOENE	**1st APPLICANT**
THEEPE MAKHAKHE	**2nd APPLICANT**
LUCY 'MABATHOANA	**3rd APPLICANT**

And

TSOTANG ALBERT MOTAI	**1st RESPONDENT**
SHERIFF OF THE HIGH COURT	**2nd RESPONDENT**

JUDGMENT:

Delivered by the Honourable Mrs Acting Justice A.M.Hlajoane
on Tuesday 28th May, 2002

This is an application seeking for an order in the following terms:

(a) That the Warrant of Execution issued pursuant to the judgment granted against the Applicants by default be stayed pending the final

determination of this application,

(b) That the judgment obtained by default on the 7th September, 2000 be rescinded and set aside,

(c) That the applicants be granted condonation for the late filing of this application,

(d) That the Respondents be ordered to pay costs.

On the hearing of this Application the first Respondent as indicated in his answering affidavit, raised the following points in limine:-

(a) That the application is out of time,

(b) Lack of urgency,

(c) Non-disclosure/outright malafides.

Application out of time;

Rule 27 (6) (a) of the High Court Rules,

"Where judgment has been granted against

defendant in terms of this rule or where absolution from the instance has been granted to a defendant, the defendant or plaintiff, as the case may be, may within twenty one days (21) after he has knowledge of such judgment apply to Court, on notice to the other party, to set aside such judgment."

According to the Applicants' papers, they show that they only became aware of the judgment against them on the 15th February, 2002. If for a moment we were to take their word, when then did they approach the Court for a relief? They only approached the Court on the 22nd April, 2002, which roughly came to something like 44 days after knowing of the judgment. This was in violation of the above quoted rule which requires only 21 days within which to approach Court for intervention.

It can only be deduced from Applicants' behaviour that they are just buying time to delay the Respondents' claim. Their application is not ***bona fide*** but ***mala fide.***

In **Nkhet'se vs Santam Bank Limited & Others** 1982 - 84 LLR 236, an application for a rescission of judgment, the Court declined to entertain the m atter as it took that because of non-compliance with the Rules of Court the application was not properly before the Court.

One other important aspect of this case is that as born out by the record,

judgment in this case was not granted by default. The record shows that on the 7th September, 2000 before my brother Peete J. appeared Mr.Phafane for the Plaintiff and Mr.Mahlakeng for the Defendant. The minutes read thus;

> "By agreement judgment is hereby entered in the sum of twenty-six thousands Maluti (M26, 000.00) with interest at 18.5% running from today's date of judgment. No order as to costs."

It would therefore be expected that when counsel so acted he was acting under instructions.

URGENCY:

It is not enough to allege urgency on the certificate of urgency and not in the founding papers. The matter is not at all urgent as the Applicants want the Court to believe. Judgment was entered by consent in September, 2000 and there is an explanation by the Respondents why it was not executed timeously. It is because there was an undertaking to pay. This clearly is an abuse of ***ex parte*** proceedings.

Rule 8, 22 of the High Court Rules 1980 clearly stipulates that reasons for urgency must be shown in an affidavit. The founding affidavit accompanying the application fell far short of the required standard of the mandatory provision of the above rule. As evidenced by the record, the

affidavit is full of misleading statements. To mention but one such misleading statement, they knew of the judgment against them in September, 2000 not 15th February, 2002. **Nt'solo vs Moahloli 1985 - 89 LAC 307.**

Security for Costs:

Rule 27 (6) (b) of The High Court Rules provides for furnishing of security for costs when one wishes to apply to Court to have the judgment rescinded.

Rule 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 rescission of such judgment."

The record does not show that any such security has been paid neither do the Applicants allege to have paid that security. **In Nonyane vs Maleke** 1985 - 89 LAC 69 the Appellant had applied to the High Court for rescission of judgment against him, but the application was refused hence his appeal. The application had been opposed on the grounds of non-compliance with Rule 27 (6) (b) of the High Court Rules. On appeal it was held that the application was correctly refused and the appeal was dismissed.

Non - disclosure;

It is trite law that a litigant who seeks ex parte relief must in drawing his/her affidavit, disclose all material facts, that is, not only facts that he considers relevant, but all other facts that may possibly influence the Court, in coming to a decision, **Nts'olo vs Moahloli** above. Legal Practitioners therefore, as officers of the Court, should be particularly astute to ensure that their clients make full and accurate disclosure of relevant facts.

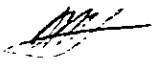
It is the Applicants' case that they were never served with the Summons in 1996 as alleged by the Respondents. But annexure "1" to the answering affidavit, is a return of service evidencing such service of summons on the Applicants on the 26th March, 1996. Annexure "B", is a notice of intention to oppose dated 30th March, 1996, whilst annexure "C" is the plea dated 17th October, 1996. A pre-trial conference annexure "E", was also held. As if that was not enough, the Applicants per annexure "F", proposed settlement on the 9th June, 1998, and in effect the Applicants made their first payment per annexure "G" on the 5th November, 1998. Judgment was entered during September, 2000 by agreement as Applicants had failed to honour their undertaking.

The Applicants at the replying stage now come out with a new story altogether, that the file went missing hence their late filing of the papers. This explanation is devoid of merit and therefore to be rejected. This never came out in their founding papers. As shown by my brother Monapathi J in

the recent case of Constituency Committee LCD No. 32 vs NEC & another CIV/APN/179/02, that no case should be built up at the replying stage. The Court in that case was not at all amused to find that there has been non-disclosure of most facts which may have affected the decision that was made.

Mr.Mahlakeng who had been acting for the Applicants at the trial stage deposed to no affidavit at all in this Application. Applicants did not take this Court into their confidence as they have failed to disclose the material facts which might have influenced the court into deciding otherwise.

The points *in limine* raised therefore succeed and the Application is dismissed with costs.



A.M.HLAJOANE

ACTING JUDGE

for applicant : Mr.Mabulu.

for respondent : Mr.Phafane.