C Of A (CIV) No. 34/2005

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

LEBOHANG KHABO **Appellant**

and

FUMANE 'MALEBONA KHABO **Respondent**

Held in Maseru

CORAM:
Steyn, P
Grosskopf, JA
Nomngcongo, J

JUDGMENT

Steyn, P

[1] The appellant sought the rescission of a judgment granted in the High Court on the 8th September 2004. In its judgment the court had granted the respondent – his wife – a decree of divorce on the grounds of his adultery, custody of their four minor children, and an order for costs. The application was brought in

accordance with Rule 45(1)(a) of the High Court Rules (the Rules) on the ground that it was erroneously granted in the absence of a party affected thereby. The court *a* quo refused to rescind these orders. The court did however rescind two other orders that had been granted ancillary to the divorce order, affecting the maintenance of the children and the forfeiture of "the benefits arising out of the marriage". It is against the order to refuse to rescind the three orders referred to above that he has appealed to this Court.

[2] The appellant was himself the plaintiff in the matrimonial proceedings. In his action he sought an order for the restitution of conjugal rights failing which a decree of divorce, custody of three of the four minor children, forfeiture of the benefits arising from the marriage and costs.

[3] To this the respondent pleaded and she herself counterclaimed for a decree of divorce on the grounds of adultery; alternatively for a restitution order on the grounds of appellant's desertion. She also claimed custody of and maintenance for the children as well as for the two orders rescinded by the High Court referred to above. The events to which I refer below occurred after the pleadings had been closed and the matter was ripe for hearing.

[4] The appellant had the distressing habit of appointing and terminating the services of his legal advisers. Thus the firm of attorneys acting for him in this appeal had been mandated to institute matrimonial proceedings on his behalf as long ago as 2001. However, their mandate was terminated in March 2004 and they were succeeded by Messrs. Nthethe and Co. on the 6th

of April 2004. A few months later their mandate was also terminated by the appellant. In October 2004 Mr. Phoofolo was appointed to initiate a rescission application. This firm, however, withdrew in January 2005 to be succeeded by Messrs. Sooknanan and Associates. They in turn withdrew in May 2005 when his present attorneys were re-appointed.

[5] When his attorneys withdrew in March 2004 they notified the respondent that the appellant's address was P.O. Box 2248, Bloemfontein, 9300" and it was to this address that the notice of set down was sent by respondent attorneys by registered post. His attorneys also sent their notice of withdrawal to the same address on the 17th of March 2004.

[6] As indicated above the appellant had appointed Messrs.

Nthethe & Co. to act for him. A notification to this effect was filed with the registrar on the 6th of April 2004 and the notice was duly served on the respondent's attorneys on the same date. It is clear from averments made by the appellant that negotiations to settle the dispute took place. Appellant avers that his attorneys appeared in court without his knowledge and "negotiated a settlement …. without first consulting with me regarding the same". He therefore terminated the attorneys' mandate. Although the appellant alleges that his attorneys filed a notice of withdrawal on or about the 24th of August 2004, no such notice was in fact filed. It would appear that the respondent must have known of the withdrawal of the attorneys because they did not seek to serve process on them, but reverted to the address his former attorneys had recorded as an address for service on him

when they withdrew on the 17th of March 2004.

[7] As stated above on the 8th of September 2004 and after hearing the evidence of the respondent the court granted her a decree of divorce on the grounds of the adultery of the appellant as well as the relief set out above. The action proceeded as an unopposed divorce and the appellant was not present or represented.

[8] It was the manner of service of the notice of set down which the appellant alleges was irregular and which he contends vitiated the judgment and orders granted by the court. These were therefore “erroneously granted in terms of Rule 45(1)(a)”.

[9] It should be noted that the appellant alleges that he never

received the registered letter containing the notice of set down. He does so in terms and in a manner which I can only describe as unconvincing and without any supportive or corroborative evidence. However, the following facts are of importance in considering whether the rescission application was correctly refused - to the extent that it was - by the High Court.

(i) The parties had been engaged in litigation since 2001 and the pleadings had been closed.

(ii) The attorney acting for the appellant at the time he withdrew nominated an address – obviously for purposes of service - at which service could only be effected by indirect means - such as a registered letter. As pointed out above, he himself sent his notification of withdrawal by registered post to the same address. It would seem that the appellant received it because he acted on it and appointed new attorneys who

acted for him for a few months.

(iii) The probabilities are therefore that the letter was duly delivered at the nominated address and received by him.

(iv) The appellant was not represented by attorneys at the time when service by registered post was effected. He had once again terminated their services. No address for service of any further process had been nominated by him as required by Rule 15(1) and (2), (3) and (4).

(v) Both parties were seeking a termination of the marriage which on both versions had irretrievably broken down. The appellant had himself sought a restitution order because of respondent's desertion relying on events that occurred in 2000.

(vi) The appellant was aware that there had been a settlement of the matter in August 2004. He alleges he did not approve of this settlement and that he had accordingly terminated the mandate

> of his then attorneys. He must therefore have appreciated that he needed to act to protect his rights but did nothing to do so until after the Court Orders were served on him.

[10] Appellant's counsel contended that service by registered post was not authorized by the Rules and that such service was a nullity. The High Court could therefore – so he submitted – not have condoned the non-compliance with the Rules. I don't agree. The authority to which counsel referred us i.e. Superior Court Practice – Erasmus – at B174 – 175 does not support this contention neither do the Rules. Rule 4 to which he referred us, is directed at regularizing the service of process "directed at the sheriff". The provisions of Rule 5 (dealing with the service of documents outside Lesotho) regulates the service of process or documents "whereby proceedings are instituted". It must be borne in mind that we are dealing with a step in the proceedings

which had reached a stage where not only a summons and a declaration had been issued but also a plea and counterclaim filed. As pointed out above the pleadings had subsequently been closed, a settlement had been negotiated, although he alleges that he had repudiated it. The process served by registered post was not a process directed to the sheriff, but a notification of the date of the hearing. The address which appellant's attorneys had nominated was the one the respondent adverted to and could only be effected by indirect means such as a registered letter. The court should therefore have regard to all the circumstances and then determine whether it was reasonable for the respondent's attorneys to notify the appellant of the date of the hearing through the means they employed. In the particular and somewhat extraordinary circumstances set out above, it is our view that it was not unreasonable for the respondent's attorneys to serve the appellant with the notice of set down in the

manner they did.

[11] It is however clear that the appellant's application for rescission should in any event not have been tolerated because there was indeed no irregularity perpetrated by the respondent in serving the notice of set down as she did. Neither counsel referred us to the provisions of Rule 15 of the Rules which prescribes the procedure to be followed when an attorney's mandate is terminated or he ceases to act for the party concerned. This Rule reads as follows:

> "15. (1) Any party bringing or defending any proceedings in person may at any time appoint an attorney to act on his behalf, who shall file a power of attorney and give notice of his name and address to all other parties to the proceedings.
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> (2) (a) any party represented by an attorney in any proceedings may at any time, subject to the provisions of Rule 16, terminate such attorney's authority to act on his behalf, and

thereafter he may act in person, or may appoint another attorney to act for him in the proceedings.

(b) The party acting in terms of sub paragraph (a) of this sub-rule shall forthwith give notice to the Registrar and to all other parties of the termination of his former attorney's authority, and if he has appointed another attorney to act for him, of such attorney's name and address. The attorney so appointed to act shall forthwith file with the Registrar a power of attorney authorizing him so to act. If no further attorney is appointed to act for the party, such party shall in the notice of the termination of his former attorney's authority as aforesaid, also notify the Registrar and all other parties of an address within 5 kilometres of the office of the Registrar for the service on him of all documents in such proceedings.

(3) Upon receipt of a notice in terms of sub-rule (1) or (2) the address of the attorney or of the party, as the case may be, shall become the address of such party for the service upon him of all documents in such proceedings, but any service duly effected elsewhere before receipt of such notice shall, notwithstanding such change, for all purposes be valid.

> (4) Where an attorney acting for any party ceases so to act he shall forthwith notify the Registrar and all parties accordingly. The notification to the Registrar shall specify the date when, the parties to whom and the manner in which the notification was sent to all parties, and shall be accompanied by a copy of the notification so sent.
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> Such notification shall be of the same force and effect as a notice under sub-rule (2). Provided that unless the party for whom the attorney was acting himself within 3 days notifies all other parties to the proceedings of a new address for service, it shall not, save in so far as the court otherwise orders, be necessary to serve the documents on him". (Emphasis added).

[12] As recorded above, no notice recording the withdrawal of appellant's attorneys Messrs. G.G. Nthethe & Co. was filed with these papers despite appellant's averment that it was. It is common cause that appellant's attorneys withdrew on the 24th of August 2004. The appellant was therefore himself obligated to

notify the respondent within 3 days of a new address for service and in the event of his failure to do so, there was no obligation on the respondent to serve documents on him. See sub-rule 15(4) and more particularly the words: "Provided that unless ……. be necessary to serve documents on him." The appellant was the architect of his own downfall by acting as irresponsibly as he did when conducting his litigation.

[13] For these reasons I am of the view that the court *a quo* was correct in refusing to grant a rescission of the orders of divorce, custody and costs on the grounds of the manner in which service was effected. There was no cross-appeal by the respondent and we are accordingly not called upon to adjudicate on the correctness of the decision of the court in respect of the orders rescinding the awards of maintenance and forfeiture. These matters, it would appear, still need to be resolved, hopefully not by

further fruitless and expensive litigation but by wise negotiation and compromise.

[14] Appellant's counsel, quite correctly abandoned any submissions challenging the decision to grant a divorce on the grounds that the adultery was not proved. We were seized only with an application for a rescission of the Court orders on the grounds stated above.

[15] For these reasons the appeal is dismissed with costs.

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J.H. Steyn
PRESIDENT

I agree: ______________________
F.H. Grosskopf
JUDGE OF APPEAL

I agree: _____________________
T. Nomngcongo
Ex Officio JUDGE OF APPEAL

For Appellant : Mr. N. Mphalane

For Respondent: Mr. S. Phafane