

IN THE HIGH COURT OF LESOTHO

In the Matter of :

MICHAEL MTHEMBU

Applicant/Defendant

v

CHHOGALA IGBALA

Plaintiff/Respondent

REASONS FOR JUDGMENT

Filed by the Hon. Mr. Justice F.X. Rooney 21st  
Day of November, 1980.

For Defendant : Mr Ramodibedi  
For Respondent: Mr. Sello

On the 17th of November, 1980, I set aside the default judgment obtained by the plaintiff in this case on the 31st of March, last. These are my reasons for that order.

On the 22nd of November, 1979, the plaintiff issued summons against the defendant claiming payment of the sum of R5050, and in addition, payment of the sum of R200 per month from September, 1979 to the date of judgment. In his declaration the plaintiff alleged that he had purchased a cafe business from the defendant for R2,000. He alleged that in September 1979 the defendant broke into the cafe and removed therefrom stock in trade valued at R2,000 and fittings worth R1,050 thereby causing the plaintiff damages in the sum of R200 per month being loss of business.

The summons having been served, the defendant filed a notice of appearance on the 29th of November in which he appointed the Maseru Hotel as the address at which he would accept notice and service of all processes in the action. On the 11th of December, 1979 the defendant filed a request for further particulars. Particulars were furnished on the 11th of February, 1980. They were not however, delivered to the defendant at the address for service indicated by him but were supplied to Advocate M.M. Ramodibedi at his chambers at Pitso Ground Maseru. Mr. Ramodibedi in a letter to the plaintiff's attorneys dated 13th of February, 1980 acknowledged receipt of the particulars and at

the same time stated that the defendant was outside the country and was expected back in two weeks time. There followed in the letter a request that the matter be held in abeyance and a complaint about a missing annexure to the particulars.

On the 13th of March, 1980 the defendant caused to be delivered to the plaintiff's attorneys a request for further particulars. On the 14th of March, 1980 the plaintiff's attorneys wrote as follows to the defendant :

"Mr. Michael Mthembu,  
Maseru Hotel,  
P.O. Box 261,  
MASERU.  
100

MJR/mkd/I.18

14th March, 1980.

Dear Sir,

re : CHHOGALA IGBAL/YOU

We refer to your request for further and better particulars served on us on the 13th instant.

Please note that we are not prepared to supply the further and better particulars requested for same have been adequately dealt with in our further particulars addressed to you on the 6th ultimo. In any event once a notice to file plea has served on you you are not entitled for further particulars. We are consequently taking the necessary steps to bar you. In short, our notice to file plea stands.

Yours faithfully,

.....  
MOHALEROE, SELLO & CO."

In an affidavit filed in his proceedings on behalf of the plaintiff one Lehlohonolo Lekaka an employee in the plaintiff's attorneys states as follows :

"On or about the 14th of March I went to the Petitioner's hotel, viz Maseru Hotel to deliver to the Petitioner a letter, a true and faithful copy of which is hereunto attached marked "C1". After the Petitioner had accepted and read the said letter, the Petitioner, without signing for the letter directed me to deliver the said letter to the offices of Advocate RAMODIBEDI as the latter was the Petitioner's lawyer. I duly complied. The office of the said Advocate RAMODIBEDI accepted delivery of the letter. The said office of Advocate RAMODIBEDI further informed me that the Petitioner's correspondence and processes in regard to the matter in case number CIV/T/295/79 were to be served on the said office."

Prior to this exchange on the 11th of March, 1980 the plaintiff's attorneys had served a notice to file plea at the chambers of Advocate Ramodibedi and not at the Maseru Hotel which was the address for service given by the defendant. The complaint is made in the plaintiff's answering affidavit that Advocate Ramodibedi created the impression that he was acting on behalf of the defendant whereas the latter argues that the notice to file plea was not properly served upon him and was thus invalid.

No attorney of record appears for the defendant in this action. On the 8th of August a special Power of attorney was placed on the Court file in which the defendant nominated Mr. Mda as his lawful attorney and agent to defend the action taken against him in the High Court of Lesotho by plaintiff. Mr. Mda has not filed any other document confirming that he is now the attorney of record for the defendant or giving a new address for service. On the other hand in appearing in Court as Counsel for the defendant at the heading of this application Mr. Ramodibedi purported to be acting on the instructions of Mr. Mda. I have no further information on this aspect of matter and all I can say is that this Court must accept the assurances of Counsel that he is properly instructed.

The responsibility for the conduct of the action rests with the attorney of record and this Court must presume on reading the special Power of attorney that Mr. Mda accepts that responsibility. He must therefore comply with the requirements of Rule 15(1) of the Rules of the High Court. Until he does so, the address for service remains unchanged.

It is clear that when Advocate Ramodibedi intervened in this litigation at an earlier stage he was not acting on the instructions of an attorney but, at the behest of the defendant.

In the case of Legal Practitioners Committee v Advocate Rashid Ahmed Karim (CIV/APN/85/79, unreported) I said : "While it is true that in some areas there is not a precise definition of the function of attorneys and advocates the distinction between the two branches of the profession depends upon the general and accepted rule that in civil matter ..... the general public has access to all attorneys, but, an advocate has no mandate to act for any person in a cause or matter unless he has first been instructed by ... an attorney duly admitted to practise before the courts of this country". On appeal to the Court of Appeal (Court of Appeal CIV/3/79 unreported) Maisels P. in reference to the above said that he agreed with these observations and went on "they afford in my judgment valuable and correct guidelines for members of the profession in Lesotho."

Advocate Ramodibedi's intervention in these proceedings was quite unwarranted. The plaintiff's attorneys were not entitled to treat with Mr. Ramodibedi as if he were the attorney for the defendant. They should not, in my view, have served the notice to file plea upon him instead of upon the defendant at the address for service given in the notice of appearance. I must in the circumstances hold that the notice to file plea was not properly served upon the defendant and it follows that the plaintiff was not entitled to bar him from pleading or make an application to this Court for judgment in default under Rule 23 of the High Court Rules (now repealed).

I think it timely that I should issue a warning to all advocates that should they take it upon themselves to act for members of the general public in civil matters without proper instructions, they may render themselves liable for all the consequences which may include an order that they pay personally the costs of any party to the proceedings.

At the hearing of the application the arguments presented were directed to the question as to whether the defendant had demonstrated that he had a bona fide defence to the action. Both parties appear to have assumed that the general principles formulated in the case of Grant v Plumbers (Pty), Ltd. 1949 (2) SA 470 applied. Brink J said at page 476

"Having regard to the decisions above referred to, I am of opinion that an applicant who claims relief under Rule 43 should comply with the following requirements :

- (a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.
- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (Brown v. Chapman (1938, T.P.D. 320 at p. 325).)"

I think a distinction must be drawn between regular and irregular judgments. By a regular judgment I mean one in which the plaintiff has proceeded in accordance with the rules of the High Court. An irregular judgment is one marred by a procedural defect of such a nature as to render it invalid. In Dykstra v Emmenis 1952 (1) SA 661 Clayden J. (as he then was)

set aside a default judgment obtained against a defendant who had died prior to the date of the judgment. There was no inquiry as to the merits of the defence. The judgment was set aside on the basis that the proper defendant was the executor of the deceased. More authority for the proposition that a default judgment obtained in contravention of the rules of the court will be set aside on that ground alone may be found in Sterkl v Kustner 1959 (2) SA 495.

The practice in England is that where the plaintiff has obtained a regular judgment it is an almost inflexible rule that on an application to set aside such judgment by the defendant there must be filed what is known as an affidavit of merits i.e. an affidavit stating facts showing a defence on the merits (Farden v Richter(1889) 23 Q.B.D. 124.) Where a judgement is obtained irregularly the defendant is entitled ex debito justitiae to have it set aside. (Anlaby v Praetorius 20 Q.B.D. 764).

For the reasons already given, this was an irregular judgment which the plaintiff ought not to have obtained. It is therefore only right that the parties be restored to the position they were in before the 31st March, 1980. In making the order I put the defendant on terms requiring him to file his plea within seven days, failing which the Registrar was authorised to restore the judgment already obtained by default. The plaintiff was given leave to file a reply within seven days and the Registrar was directed to set the case down for hearing as soon as possible after the close of the pleadings on the application of the plaintiff.

I made no order as to costs as I received no submissions on this spect of the matter. I reserve the questions of costs to be decided when a final judgment is obtained in this Court.

F.X. ROONEY  
JUDGE

21st November, 1980.

Attorney for the Plaintiff:  
Mohaleroe, Sello & Co.  
Attorney for the Defendant ;  
Mr. Mda.