CIV/APN/207/79

IN THE HIGH COURT OF LESOTHO

In the Application of :

LEBAMANG NTISA)
PHETHANG MERAFO) Applicants
SEHEHERE MARE)

v

TANKI FIEE Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 5th day of December 1980

This is an application to rescind a judgment granted in favour of the respondent by Mofokeng J on 17th June 1977 in default of appearance by the three applicants. The respondent had lodged an action on the 28th October 1976 claiming damages in the sum of M3000 for wrongful arrest and imprisonment. Mofokeng J satisfied himself that the applicants had been served, heard evidence from three witnesses, and after a reasoned Judgment, allowed the respondent his whole claim. A copy of his Judgment is annexed to the original copy of my own.

The three applicants aver in their founding affidavits firstly that they have never received summons to appear and that the Judgment came to their knowledge only after a visit of the deputy sheriff to their homes on 15th August 1979 when armed with a writ of execution, and secondly that they have a good defence to the action; applicant 1's defence being that he found the respondent (and his family) felling trees in a "national plantation" under his care and reported this to applicant 2 a headman who with other people accompanied him to the plantation where they arrested the respondent (and his family) and took him to custody to Bela Bela; applicant 2's defence being that before he took action he reported to his principal chief who instructed him to bring "the culprits" over and he "kept" the respondent (and others but not the women) in his cousin's house who provided him (and his party) with all the amenities of life until they were to appear in court; appellant 3's defence being that he was not present at

the time of the arrest (on Friday) but came to the picture on the following Tuesday when he was instructed by the principal chief to request the President of the Local Court to convene a court to try the respondent on criminal charges.

The application was resisted. The facts that emerge, but only from the opposing affidavit, are as follows :-

The respondent Tanki Fiee and his uncle Konkotia Fiee issued out of the High Court two separate summonses against the same applicants respectively under CIV/T/108/76 and CIV/T/113/76 each individually seeking damages from the applicants for his own wrongful arrest and imprisonment.

Perusal of the papers in the two cases shows that the deputy sheriff served both sets of papers on the applicants at the same time. He certified as follows in respect of each return :

> "At Bela Bela on this 29th day of Nov. 1976 I served the notice to file plea:-
>
> 1st Defendant Lebamang Ntisa
> 2nd Defendant Phethang Merafo
> 3rd Defendant Sehehere Mare
>
> I exhibited the originals to them and explained to them the nature of the documents at the same time as the service".

The applicants now aver, but only in replying affidavits, that they did indeed receive a summons, a declaration, and notice to file plea, in respect of CIV/T/113/76 where Konkotia Fiee is plaintiff as certified by the deputy sheriff but not the papers in connection with CIV/T/108/76 wherein Tanki Fiee (the respondent) was the plaintiff. From a study of the papers in CIV/T/113/76 it is clear that the applicants did not enter an appearance to defend even in that case certainly not timeously. The endorsements on the files show that Mr. Maqutu moved the Court to get a default Judgment in both cases together on 18th April 1977 a motion day. The respondent avers that on that day, Mr. Ramolefe, then in private practice, saw the two cases on the motion roll and told Mr. Maqutu that the applicants had briefed him or had come to brief him but that he had done nothing due to pressure of work. Mr. Maqutu and the respondent conferred with Mr. Ramolefe who suggested that they request the Court for an adjournment. The respondent refused whereupon Mr. Ramolefe left saying that "if they get judgments they will be rescinded". The applicants did not file

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an affidavit from Mr. Ramolefe and the respondent's averment must be taken as true. The matter came before Mofokeng J. Since the claims necessitated the calling of viva voce evidence to substantiate the quantum of damages they were most probably crowded out for lack of time and postponed to the 9th May 1977. This was a motion day also before Mofokeng J and most probably were crowded out as well. The two cases were postponed to 10th June 1977 which was a Friday. Mr. Ramolefe, if he was truly briefed, made no appearance or file papers of any kind whatsoever at any time. On that day Mofokeng J heard the evidence of three witnesses and gave Judgment on the 17th June 1977 as I had earlier stated. He did not hear evidence in CIV/T/113/76 probably because there was no time left. Mofokeng J postponed the hearing of that case to the 14th September 1977 when it was listed before me. There was still no entry of appearance and no plea but two of the applicants (1 and 3) turned up in Court. I made the following endorsement:

"14/9/77:

Maqutu for plaintiff.

Defendant 1 present in person.
Defendant 2 absent.
Defendant 3 present in person.

Defendants 1 and 3 say they have briefed Mr.Ramolefe.

Court notices that defendants are lay and explains to them the position.

Court ask Maqutu whether he is willing to lift the bar.

Mr. Maqutu says he is prepared to lift the bar.

Order:(1) Mr.Maqutu to supply three copies of the summons and the declaration to defendants 1 and 3(defendant 1 and defendant 3 have undertaken to give one copy to defendant 2 who lives in their village).

(2) It is recorded that defendant 1, defendant 2 and defendant 3 have entered an appearance in person.

(3) Defendants to file plea within 14 days of today. Maqutu to be given a copy of plea.

(4) Costs of today to plaintiff in any event.

T.S. Cotran "

It is apparent from the papers that applicants 1 and 3 (defendants 1 and 3) went to see Mr. Monapathi and although it was unnecessary for him to do so he filed on their behalf "notice of intention to defend" on 30th September 1977. The plea was not filed at the Registrar's office however except

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on the 19th October 1977 nearly three weeks after the time limit I had set. The indulgence I gave them was clearly undeserved. On the 5th October 1979 Mr. Monapathi withdrew and the papers were handed to Mr. Sello on 19th October 1979.

In CIV/T/108/76 Mr. Maqutu proceeded to execution on the default Judgment. The deputy sheriff certified in his return that he handed the execution documents to an assistant sheriff at TY who experienced difficulties as the applicants refused to cooperate. On the 15th July 1979 the deputy sheriff himself with his assistant proceeded to the applicants homes and found applicants 2 and 3 there. He attached the whole herd of cattle and stock in their possession. He avers that both applicants begged him and his assistant not to remove the cattle and they promised to come and pay up the judgment debt in Maseru a week later. They did not do so. On the 12th August 1979 the deputy sheriff and his assistant went up again to the applicants homes. The applicants requested 4 more days to raise the money. The money was not forthcoming. On the 16th October 1979 the deputy and his assistant went up again and siezed the cattle and other stock. On the 27th October 1979 the cattle and stock were sold by auction for the sum of M2195 which sum, by courtesy of Mr. Maqutu, the respondent had not yet reached. It was then that Mr. Sello moved the Court on their behalf (on 29th October 1979) to rescind the default Judgment on the grounds earlier mentioned

Now a sheriff's return of service is prima facie evidence of the truth of its contents. It can of course be impeached but the courts require clear and satisfactory proof that it is incorrect (Deputy Sheriff v. Goldberg 1905 TS 684). I am by no means satisfied that the applicants are truthful in their assertion that they did not receive the summons On the contrary they have approached the Court with singular lack of frankness and candour but abundance of circumlocution.

After the disclosures in the opposing affidavit and the sheriff's certificate Mr. Sello found himself in an uncomfortable position. (See Poseidon Ships Agencies(Pty)Ltd v. African Coaling and Exporting Co.(Durban)(Pty)Ltd. and Another 1980 (1) S.A. 313. The crux of his argument now on the applicants behalf is that even though the applicants may have been untruthful and evasive in their founding affidavits the default Judgment given against them should still be rescinded on the very broad principle that the ends of justice so

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require because if the applicants are successful in that other case it would surely mean that the respondent would have unlawfully enriched himself unjustly by operation of the law. It is an ingenious argument but he cited no case in support of the contention that this is a material consideration which a court ought to take into account when reaching a decision whether to rescind or not.

The allegation that the applicants knew of the Judgment only on the 15th August 1979 is negatived by the deputy sheriff's return which says they knew about it in July 1979. But even if there was a mistake in the date it was incumbent upon them to make their application for rescission within six weeks of the 15th August 1979 in terms of Rule 16 of the then current High Court Rules (the present rule is 21 days). The application was not made until the 19th of October 1979, well out of time. It is also common cause that no separate and substantive application was ever filed for condonation. (See Vleissentrad v. Dittmar 1980 (1) S.A. 918 at 919 Headnote)

The Law's attitude in applications of this nature is well known and has been explained on a number of occasions by Courts both in Lesotho and in South Africa The Courts do have a wide discretion, but there are three essentials that an applicant must discharge in the following order : Firstly he must explain to the Court's satisfaction the reasons for the default. In this the applicants have failed and thus could not surmount the first hurdle. Secondly he must persuade the Court that the application is bona fide and not made with the intention of merely delaying the plaintiff's claim. In this the applicants have also failed. Thirdly he must show a bona fide defence to the plaintiff's claim Unfortunately I should not make specific comments on that aspect as I do not wish to usurp the function of the trial judge who will still have to try that other case in due course, but it does clearly appear from the opposing affidavit that the "national plantation" the applicants are talking about is in fact land belonging to the respondent's uncle over which he had won court Judgments which resulted in the respondent's acquittal by the President of the Local Court on the criminal charges brought against him in consequence of his arrest and detention.

The application to rescind has come three years after the service of the summons when execution has already taken

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place. This is wilful default which the Court is not prepared to condone (Grant v. Plumbers(Pty)Ltd 1949 (2) S.A 470; Vincollete v. Calvert 1974 (4) S A. 275; De Wet and Others v. Western Bank Ltd 1977 (4) S.A. 770; Roopnarain v. Kamalaphathy and Another 1971 (3) S.A. 387).

The application is dismissed with costs to respondent.

CHIEF JUSTICE
5th December, 1980

For Applicants : Mr. Sello
For Respondent . Mr. Maqutu