CIV/T/174/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

YEHUDA YACOV DANZINGER — Applicant/Plaintiff

and

FUN CITY (PTY) LIMITED — Respondent/Defendant

JUDGMENT

Delivered by Mrs. Justice K.J. Guni

on the 19th day of February 1996

This is an Application for rescission of two judgments granted by this court in the absence of Defendant/Applicant. The first judgment was granted on 22/5/1995. The second judgement was granted on 29/5/1995. Initially Plaintiff/Respondent issued out of this court summons against Defendant/Applicant in CIV/T/174/95. On 11/5/1995 the Defendant/Applicant filed AN APPEARANCE TO DEFEND. On the same date papers in respect of NOTICE OF APPLICATION FOR

JUDGMENT were delivered on behalf of Plaintiff/Respondent. In that NOTICE OF APPLICATION FOR SUMMARY JUDGMENT it was indicated that such application will be made on 22/5/1995. NOTICE OF INTENTION TO OPPOSE was delivered. The Opposing Affidavit was served only upon the attorneys of the Plaintiff/Respondent on 19/5/1995. (See paragraph 5.3). It was not filed with this court timeously as required by the rules.

The Plaintiff/Respondent's summons issued out against this Applicant/Defendant consisted of two claims. The first claim is for the payment of the sum of M200,500.00 (Two Hundred Thousand and Five Hundred Maloti). The second claim is for the payment of the sum of M20,000-00 (twenty Thousand Maloti). The first judgment was entered in respect of the second claim of the payment of M20,000-00. The second judgment entered against this Applicant/Defendant on 29/5/1995 is in respect of the payment of M200,500-00.

This application for rescission of these two judgments is opposed. Mr. Buys for Plaintiff/Respondent argued that the procedure adopted, by this Applicant/Defendant by applying for rescission of these two judgments, is wrong. The two judgments according to Mr. Buys's submission were obtained as a result of an Application for summary judgments not default judgements. The option open for Defendant/Applicant is to

proceed by way of Appeal against both of these judgments. Advocate Malebanye argued on behalf of the Applicant/Defendant that this Application for rescission is made in terms of Rule 45 (1) (a) HIGH COURT RULES, Legal Notice No.9 of 1980. The relevant part relied on reads as follows:

> "45 (1) 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) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

I shall deal first with the judgment that was entered on 22/5/1995 for an amount of M20,000-00 (Twenty Thousand Maloti). In terms of Rule 45 (1) (a) can it be said that the judgment obtained on 22/5/1995 was erroneously sought or erroneously granted? The Applicant/Defendant was in default. Its attorney did not appear in court. The advocate who handled the matters of that firm of attorney was not given instruction to handle this application in court on 22/5/1995. This is how the judgment was granted in the absence of the Applicant/Defendant.

The attorneys of the Applicant/Defendant became aware

that an application for summary judgement will be made on 22/5/1995. When the NOTICE of such application was served upon them on 11/5/1995. As pointed out earlier on THE NOTICE OF INTENTION TO OPPOSE was filed timeously. An Opposing Affidavit was prepared and served upon the attorneys of record of the Plaintiff/Respondent on 19/5/1995. It is the contention of the Plaintiff/Respondent that the Opposing Affidavit filed in court did not comply with the Rules of this court regarding filing. Rule 28(3) HIGH COURT RULES Legal Notice No.9 of 1980 provides that Opposing Affidavits shall be filed before noon not less than two court days before the hearing. The Opposing Affidavit was not filed with the Registrar of this court in accordance with this Rule.

The Applicant/Defendant's case, as appears from the Affidavit of SEYMOUR CLYDE HARLEY, for the Applicant/Defendant, is based on its failure to file Opposing Affidavit timeously and its failure to appear before the court on the date of the hearing of the Application for Summary Judgement. An advocate who handled the matters of the firm of attorneys representing Applicant/Defendant in this matter, was not instructed to deal with the Application for Summary Judgement on 22/5/1995. The Application/Defendant's attorneys were aware that an Application for Summary Judgement was going to be made on 22/5/1995, as a result of their awareness Mr. Harley decided, instead of instructing an advocate to deal

with the application for summary judgment, to write a letter to the Plaintiff/Respondent's attorney - Annexure SCH 1 attached to SEYMOUR CLYDE HARLEY'S SUPPORTING AFFIDAVIT. The said letter has a provision where its receipt is acknowledged. There is no such acknowledgement of its receipt. Nevertheless the Applicant/Defendant's attorney saw it fir not to take any steps with regard to that APPLICATION for summary judgment.

It is contented on behalf of the Applicant/Defendant that despite the fact that THE NOTICE OF Application for Summary Judgement was properly made, the matter failed to appear on the Motion Roll as expected on 22/5/1995. Its absence from the Motion Roll is relied on as an excuse for the Applicant/Defendant's failure to attend court on 22/5/1995. It is the absence of the matter from the Motion Roll which made the Applicant/Defendant's attorney to refrain from giving instructions to advocate Malebanye to handle the opposition to that Application for Summary Judgment on 22/5/1995. Shall deal with that omission presently.

It is the matter of common cause that because of the inefficiency of the Registry Office, frequently the matters that are properly set down for hearing do not appear on the Motion roll. As a result there is a practice that after the court has dealt with all the matters appearing on the Motion roll, those matters which have been inadvertently left out of

the roll by the registry clerks, are put before the court. This is what happened in this case.

As I have indicated earlier on, it is the Applicant/ Defendant's case, that it failed to file the Opposing Affidavit timeously. The Applicant/Defendant does not even bother to give sufficient reason for its failure to serve or file the Opposing Affidavit timeously. This court is not urged to consider this as a special case. On the authority of MEEK v KRUGER 1958 (3) SA Page 154, the court should bear in mind those factors when exercising its discretion. There is no reason at all given why this Applicant/Defendant wishes to defend the Plaintiff/Respondent's claim for the payment of the sum of M20,000-00 (Twenty Thousand Maloti).

The facts in our present application for rescission of two judgments are almost identical with the facts in MORRIS v AUTOQUIP (PTY) LTD 1985 (4) SA 398. In both cases the applicants are relying on their own default to seek rescission of the judgments obtained when they were in default. In both of the cases the applicants had filed although in our case out of time, the Opposing Affidavits. The court, when considering judgment in the Application for Summary Judgment, is not entitled to ignore the Affidavit filed. MORRIS v AUTOQUIP. On 22/5/95 the Opposing Affidavit, although filed out of time, must have been considered. At page 4 paragraph 3.10

Defendant/Applicant stated "The Defendant company admits its liability to the Plaintiff in the sum of M20,000-00 (Twenty Thousand Maloti) and this amount will be paid into court by due course by the other Majority Shareholders". There is no reasonable excuse to withhold payment of M20,000-00. That sum must be paid forthwith. In Opposing the grant of Summary Judgment, the Defendant needed to satisfy the judge that it had good defence; not only that, but the disclosure of the facts which are regarded as entitling him to defend should have been made. Admission of liability made at paragraph 3.10 Opposing Affidavit cannot be held to be a good defence. An indication that payment is made into court (although no such payment was actually made) supports the averments that the Summary Judgment was properly entered as this defendant had no defence against the claim of payment for the sum of M20,000-00. The Application for rescission of this judgment in this circumstance is typical attitude of cunning and unwilling debtors who exploits our system of legal procedure in order to withhold from creditors that to which they are justly entitled." MEEK v KRUGER (Supra.) At Paragraph 11.1.4 Founding Affidavit. It is alleged as follows: " In the face of the summons .... applicant resolved to secure eventual payment of that loan immediately." This is further support that the sum of R29,000-00 is owing, due and payable forthwith.

The second judgment was entered against the Applicant/Defendant on 29/5/1995. Once again the matter was not enroled. This time there was no Notice that the matter will be heard on 29/5/1995. The matter came to be heard again on the 29/5/1995 because on 22/5/1995 the court postponed the hearing or granting of the Application for Summary judgement. The reasons for the postponement have not been disclosed.

At paragraph 11 Founding Affidavit it appears that the claim for payment of M200,500-00 in respect of the first claim in the Summons, is disputed. The Application/Defendant has "sufficient cause" to warrant granting of the rescission of the judgment. At paragraph 3 Opposing Affidavit for Summary Judgment deposed to one EDWARD STUART SYKES it becomes abundantly clear that the Applicant/Defendant has a defence against this claim. This claim may or may not be known to the Applicant/Defendant in which case there is "sufficient cause" shown to warrant the granting of rescission of the said judgment. The indications made at the time the application for judgment was made clearly show that the merits of the dispute were not considered before summary judgment was entered. This judgment in respect of the 1st claim for the payment of the sum of M200,500-00 is set aside.

For ordinary Relief

It is ordered:

(a)

(1) The Application for rescission or setting aside of the judgment entered against the Applicant/Defendant on 22/5/1995 for the payment of M20,000-00 is dismissed.

(2) The Application for rescission of judgment entered against Applicant/Defendant on 29/5/1995 for the payment of M200,500-00 succeeds.

(b) The warrant of execution issued under the hand of the Registrar of this court on 12/7/1995 must be stayed.

COSTS

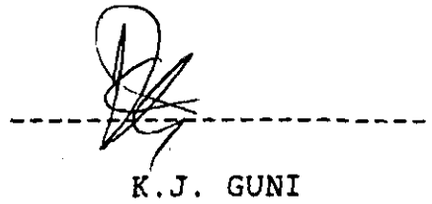
The APPLICANT/DEFENDANT's Attorney has asked this court to punish the Plaintiff/Respondent's attorney for allegedly snatching these judgments. The request is made for cost at the rate of attorney and client and for th same to be paid by the attorney.

It is the finding of this court that the said judgments were not snatched as alleged. There was instead negligence on the part of the Applicant/Defendant's attorney who must have been aware that the matter was set down for the hearing of the Application for Summary Judgment but who was content to stay away from the court because the clerks in the Registrar's office had inadvertently left off the Motion Roll of that date the said Application. The practice of placing of those matters inadvertently left out of the court roll before the judge when the matters that are on the roll have been completed is well known to the Legal Practitioners of this court. It was an irregular and improper step to write the letter annexure SCH 1 Rule 30(1) HIGH COURT RULE Legal Notice NO.9 of 1980 should have been complied with.
To stay away from court in those circumstances was inexcusable.

The parties have partly succeeded. They have partly

failed. I consider it appropriate to order that each party bears its own costs.

It was not only discourteous to deliberately stay away from attending the court simply because the clerks in the Registry office had inadvertently omitted showing on the Motion Roll that the application for summary judgment will be heard as notified, but was directly prejudicial to the interests which he had duty to protect, those of his client. This was so more particularly when all the practising attorneys and advocates of this court know the practice of placing before the judge at the end of the matters appearing on the roll, all those matters which were inadvertently left ou



K.J. GUNI

JUDGE

For Plaintiff : Du Preez, Liebetrau & Co

For Defendant : Harley & Morris