CIV/A/24/91

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

KUNATE BOY RAMABUSA .....1st Applicant
TEBOHO RAMABUSA .....2nd Applicant

and

MOKALE MOHAJANE ..... Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai on the 18th day of June, 1996.

This is an appeal against the decision of the Subordinate Court of Maseru, dismissing, with costs, an application for rescission of a default judgment granted on 8th June, 1990.

According to the papers, placed before me, it would appear that, on 24th August, 1989, the Respondent (hereinafter referred to as Plaintiff) filed, with the clerk of the court, summons commencing an action in which he, inter alia, claimed, against the appellants (hereinafter referred to as Defendants) damages in the total amount of M7,090-00. In his declarations to the summons, plaintiff, inter alia, alleged that on 13th August, 1989 and at or near Qeme,

in the district of Maseru, the defendants unlawfully and intentionally assaulted him. On the same day, 13th August, 1989, he apparently reported the incident at Morija Police station and the police officers referred him to Scott hospital, where he was afforded treatment by a medical doctor who wrote his findings in the health book of the applicant.

According to the medical findings in the applicant's health book of which copy was attached to the declarations to the summons, plaintiff had, on 13th August, 1989, been assaulted, on the head, with a blunt object and sustained a laceration on the forehead. The injury was apparently not dangerous to life for plaintiff was treated as an out patient.

In his declarations to the summons, plaintiff further alleged that, by reason of the foregoing, he had suffered damage for which he held the defendants, jointly and severally, liable in the total amount of M7,090-00 plus costs, calculated as follows:

(a) M7000-00 damages for the unlawful assault.

(b) M54-00 medical expenses.

(c) M36-00 as transport expenses.

It is significant to observe that the summons was, on 31th August, 1989, duly served, at the residence of the defendants, upon the wife of the 1st defendant, who was the father of the 2nd defendant (a minor). Rule 1 of Order No. VII of the Subordinate Court Rules (p.609 of the Laws of Basutoland 1960 Ed. Vol.I) provides, in part:

> "1. The process of the court for commencing an action shall be by summons calling upon the defendant to enter an appearance within a stated time after service .... to answer the claim of the plaintiff, and warning the defendant of the consequences of failure to do so;....."

Notwithstanding the fact that, in pursuance of the provisions of the above cited rule 1 of Order No. VII of the Subordinate Court Rules, the summons required the defendant to file, within seven (7) days after it had been served upon them, a notice of appearance to defend the action, the notice was entered or filed, with the clerk of the court, only on 13th September, 1989 i.e. 14 days after the summons had been served on the defendants (on 30th August, 1989). The notice of appearance to defend the action was, therefore, entered or filed, with the clerk of the court, seven (7) days out of the time limit stated in the summons.

It is to be noted that rule 1(1) of Order No.XV of the Subordinate Court Rules provides, in part:

> "1(1) The defendants shall within seven days after appearance ... deliver a statement in writing to be called plea ..."

No such plea was delivered, in accordance with the provisions of the above cited rule 1(1) of Order No.XV of the Subordinate Court Rules. The defendants were on 25th September, 1989, consequently served with notice to file plea, pursuant to the provisions of rule 3 of Order X of the Subordinate Court Rules. The rule reads in part:

> "3. If the defendant has entered appearance but has failed to deliver a plea within the time limited by rule 1 of order XV, the plaintiff may deliver notice in writing calling upon the defendant to deliver a plea within forty-eight hours of receipt of such notice, and on failure of the defendant so to do may lodge, with the clerk of the court, a written request to have judgment entered in the same manner as if the defendant had failed to enter appearance to defend."

Following service of the notice to file plea upon them, on 6th October, 1989 the 2nd defendant filed, with the clerk of the court, and served upon the plaintiff, a notice of objection. It is to be observed that, if he wished to file notice of objection, the 2nd defendant was required, in terms of

the provisions of rule 1 (1) of Order No. XIII of the Subordinate Court Rules, to do so within seven (7) days, after he had filed, with the clerk of the court notice of appearance to defend. The rule reads, in part:

> "1(1) A defendant shall within seven days after entry of appearance deliver ... objection of the proceedings ..."
>
> (My underlining)

I have underscored the word "shall" in the above cited rule 1(1) of Order No. XIII of the Subordinate Court Rules to indicate my view that the provisions thereof are mandatory. In the instant case, the defendants had, however, filed, with the clerk of the court, notice of appearance to defend on 13th September, 1989. When on 6th October, 1989, the 2nd defendant filed, with the clerk of the court his notice of objection, he did so 23 days after the notice of appearance had been filed. The notice of objection was terribly out of time and, therefore, irregularly filed.

On 16th October, 1989 plaintiff approached the court with an application for default judgment which was duly accompanied by an affidavit, in compliance with the provisions of Order No.X of the Subordinate Court Rules of which Order subrule (4) of rule 4

reads:

> "(4) The clerk of the court shall refer to the court any request made under Rule 2 or Rule 3 of the Order for entry of judgment on a claim for damages and the plaintiff shall furnish to the court evidence either oral or by affidavit of the nature and extent of the damages suffered by him. The court shall thereupon assess the amount recoverable by the plaintiff as damages and shall enter judgment therefor."
>
> (My underlining)

Inasmuch as it is relevant, plaintiff averred, in the accompanying affidavit filed in support of the application for default judgment, that he was employed as a technician by the Lesotho Telecommunication Corporation. He reiterated his allegations in the declarations to the summons viz. that on 13th August, 1989 and at or near Qeme, in the district of Maseru, the defendants unlawfully assaulted him with sticks. On the same day, 13th August, 1989, he went to Scott hospital at Morija, where a medical doctor treated and required him to attend regular check ups. Plaintiff attached copies of his health book and payment receipts as annexure "A" and annexure "B", respectively, to prove that following the assault, perpetrated on him by the defendants, he was afforded medical treatment for which he paid a total amount of M54-00. In his averments, plaintiff further said he used his own car to go for medical treatments and

incurred expenses in the total amount of M36-00. As a result of the unlawful assault, Plaintiff suffered general damages in the total sum of M7000.00 for which he held the defendants liable, jointly and severally. Consequently, he prayed for relief as claimed in the summons.

It may, however, he mentioned that when, on 16th October, 1989, the application for default judgment was moved, plaintiff, inter alia, told the court that he was abandoning, in his total claim of M7090-00, an amount of M1090-00. The reason therefor was to bring the claim within the jurisdiction of the subordinate court.

On the facts disclosed by the only available affidavit before the court, plaintiff had, in my view, established a case for default judgment. The court a quo accordingly entered judgment, with costs, for the plaintiff in the total amount of M6000, presumably calculated as follows: M36-00 as transport expenses; M54-00 as medical expenses; and M5910-00 as general damages for the assault.

I have, in the above cited subrule (4) of rule 4 of Order No.X of the Subordinate Court Rules, underscored the word "shall" to indicate my view that the provisions thereof are mandatory. After plaintiff

had furnished evidence (by affidavit) stating the nature and the extent of damages suffered by him, the court was obliged to assess the amount recoverable to plaintiff. It simply had no choice in the matter. However, it would appear that in granting the default judgment, as it did, the court a quo made no effort to assess, as it was required to do in terms of the provisions of subrule (4) of rule 4 of order No.X of the Subordinate Court Rules, the amount of damages recoverable to plaintiff. This court is, therefore, at large to assess, on the basis of the facts disclosed by the affidavit, filed in support of the application for default judgment, the amount of damages recoverable to plaintiff.

I shall turn first to plaintiff's claims for special damages of transport and medical expenses. As regards the special damages for transport expenses, all that his affidavit disclosed was that when he went for medical treatments, plaintiff used his own car and the total amount of expenses incurred was M36-00. In the case of Molahli v. Ramakatane, CIV/APN/207/86 (unreported) it was held by Sir Peter Allen, J. that specific damages had to be proved substantially and precisely. - see also Moeketsi v. Matela and Another, CIV/T/429/89 (unreported) and Mahao v. Little Flower C.Church, CIV/T/136/86 (unreported). A mere statement that plaintiff suffered specific damages in the total

amount of M36-00 as transport expenses was, therefore, not enough. Consequently, I am not prepared to award damages under this head.

In his affidavit, filed in support of the application for default judgment, plaintiff averred that following the assault on him, he was obliged to seek medical treatment for which he paid a total amount of M54-00 as special damages for medical expenses. As proof thereof he attached annexure "B" i.e. payment receipts numbers 84883, 84881 and 86346 dated 14th August, 1989, 18th August, 1989 and 22nd August, 1989, respectively. The amount of M54-00 as special damages for medical expenses had, in my view, been satisfactorily proved. Plaintiff is accordingly awarded damages in the amount of M54-00 under this head.

As it has already been pointed out, plaintiff abandoned, at the hearing of the application for default judgment, an amount of M1090 in his total claim of M7090-00 to bring it to M6000 which was within the jurisdiction of the Subordinate Court. Having dealt with the specific damages of transport and medical expenses in the amounts of M36-00 and M54-00, respectively, the balance is M5910-00 which is presumably plaintiff's claim for general damages in respect of the assault.

In his affidavit, filed in support of the application for default judgment, plaintiff averred that as a result of the assault on him by the defendants, he sustained injuries on the head. On the same day, 13th August, 1989, he went to Scott hospital where he was apparently treated as an out patient by a medical doctor, who reduced his findings to writing in plaintiff's health book which was attached to the affidavit as annexure "A". According to annexure "A", plaintiff had sustained, on the left side of his forehead, a laceration which had to be sutured.

Regard being had to the fact that he was not even admitted in hospital, it is reasonable to infer that the assault on plaintiff was not very serious. That being so, the amount of M5910-00 as general damages for the assault was crossly inflated. The justice of the case will, in my assessment, be met by the amount of M500-00 which is accordingly awarded under this head.

Be that as it may, on 16th October, 1989, plaintiff caused a writ of execution to be issued, against the defendants, in the amount of M6000-00 plus costs. On 3rd January, 1990 the writ was duly served and the property of the 1st defendant attached in execution thereof.

On 30th January, 1990, the defendants filed, with the clerk of the court, and served, upon the plaintiff, a notice of application in which they sought an order framed in the following terms:

> "1. rescinding the default judgment granted to the plaintiff on 16th October, 1989.
>
> 2. Further and/or alternative relief."

Plaintiff intimated intention to oppose the application. The founding and the answering affidavits were duly filed by the defendants and the Plaintiff, respectively. No replying affidavits were, however, filed by the defendants.

It was not really in dispute, from the affidavits, that the parties resided at Qeme, in the district of Maseru. In their founding affidavits, defendants averred that they had never assaulted plaintiff as alleged in his declarations to the summons. According to his averment, the 1st defendant was not even served with the summons. He and the 2nd defendant were merely informed by their attorneys of record that on 16th October, 1989, plaintiff had obtained, against them, a default judgment on the ground that their attorneys of record were not entitled to file a notice of objection where they had been served with notice to file plea. A writ of

execution was subsequently issued and executed against the property of the 1st defendant on 16th October, 1989 and 3rd January, 1990, respectively.

The defendants further averred that they were not in wilful default and had a valid defence inasmuch as they did not assault the plaintiff. They were, therefore, advised, presumably by their attorneys of record, that plaintiff was not entitled to the default judgment before he had successfully moved the court to set aside the notice of objection filed, on behalf of the 2nd defendant, by their attorneys of record and the damages awarded to plaintiff were excessive regard being had to the injuries, if any, reflected in the medical report handed in at the hearing. Hence the application for rescission of the default judgment.

In his answering affidavit, plaintiff averred that defendants were duly served with summons. He denied, therefore, 1st defendant's averment that he was never served with the summons.

It is significant to observe that according to the return of service dated 30th August, 1989 and filed in the record of proceedings in this case, the messengers of the court served both defendants with the summons by delivering copies thereof to the wife of the 1st defendant at his home. As it has been

stated earlier in this judgment, on 13th September, 1989, both defendants filed, with the clerk of court, their notice of appearance to defend, in which notice they appointed the address of their attorneys of record as the address at which they would accept service of further processes in this matter. If it were true that he was never served with, and, therefore, knew nothing about the summons, the 1st defendant could not, in my view, have intimated as he did, his intention to defend the action. In his denial that the summons had been served on him, the 1st defendant was simply not being honest with the court.

Defendants' averment that they were informed by their attorneys of record that plaintiff had obtained default judgment on the ground that the attorneys were not entitled to file, on behalf of the 2nd defendant, notice of objection where they had been served with notice to file plea was denied by plaintiff. In support of his denial, plaintiff referred the court to his affidavit, filed in support of the application for default judgment. The affidavit was attached as annexure "A" of which para. 8 clearly indicated that the application for default judgment was based on the ground that the defendants had failed to deliver their plea within forty-eight hours of their receipt of notice to file plea.

It is worth noting that although, in their founding affidavits, filed in support of the application for rescission, defendants averred that they had been informed by their attorneys of record that plaintiff had obtained default judgment on the ground that the attorneys were not entitled to file on behalf of the 2nd defendant notice of objection, where they had been served with notice to file plea, no affidavit was, however, filed by the defendants' attorneys of record to substantiate their (defendants') averment. The defendants' averment in that regard remained, therefore, inadmissible hearsay on which the trial court, properly advised, could not rely for its decision.

Plaintiff further denied defendants' averments that they were not in wilful default inasmuch as they did not assault him. The ground upon which the defendants relied for their averment that they were not in wilful default, seemed to be that after he had been served with notice to file plea, 2nd defendant filed a notice of objection in which he indicated that he would, at the hearing, apply for the extension of the time during which to file the process. In the contention of the defendants, the objection raised by the 2nd defendant should have first been disposed of by the court before plaintiff could properly apply for

default judgment.

I am unable to agree. It is significant to observe that rule 2(1) of Order No.XXXIII of the Subordinate Court rules provides:

"2(1) Any time limit prescribed by these rules (except the period within which appeal must be noted) may at any time whether before or after the expiry of the period limited be extended -

(a) by the written consent of the opposite party; and

(b) if such consent is refused, then by the court on application and on such terms as to costs and otherwise as may be just."

In the present case, it is not really in dispute that the notice of objection was filed out of the time limited to file such process. There is, however, no indication that plaintiff's written consent to file the belated notice of objection was sought and refused. Assuming, for the sake of argument, that plaintiff's written consent was sought and refused, there is no indication that the court was approached with an application for leave to file the notice of objection out of time. The belated notice of objection was simply filed in total disregard of the provisions of the above cited rule 2(1) of order No. XXXIII of the Subordinate Court Rules. For this reason the ground upon which the defendants relied

for their averment that they were not in wilful default, viz. that the objection raised by the 2nd defendant should have first been disposed of by the court before plaintiff applied for default judgment, could not hold water.

The defendants' averment that they had a valid defence inasmuch as they did not assault him was denied by the plaintiff. As proof that he had, indeed, been assaulted, on 13th August, 1985, plaintiff referred the court to his founding affidavit, filed in support of the application for default judgment. In that affidavit, plaintiff had attached annexure "A" (his health book) which clearly showed that he had sustained injury as a result of an assault on him.

The salient question for the determination of the court was whether or not the defendants were the persons who had assaulted the plaintiff. In this regard it is important to bear in mind that, on the affidavits, it was not in dispute that plaintiff and defendants lived in the same area viz. Qeme, in the district of Maseru. As people who lived in the same area, they naturally knew each other and the possibility of a mistaken identity was, therefore, very remote. Indeed, defendants advansed no reason why, if they did not, plaintiff could aver that they

were the persons who had assaulted him. There is not the slightest doubt, in my mind, that in their averment that they were not the persons who had assaulted plaintiff and had, therefore, a valid defence. The defendants were once more not being honest with the court.

Finally, defendants further averred that the damages awarded to the plaintiff were excessive and bore no relationship to the injuries reflected in the medical report handed in at the hearing. I must say I have had the occasion to read through the record of this case. Apart from his health book which was annexure "A" attached to the affidavit filed in support of the application for default judgment, there was no indication that any medical report was handed in at the hearing, in respect of the plaintiff. The only medical report, filed in the record of this case, was in respect of Teboho Ramabusa who is the 2nd defendant. Defendants' averment that damages awarded to plaintiff bore no relationship to the injuries reflected in the medical report handed in at the hearing did not, therefore, make sense nor could it be supported by papers filed in the record of this case.

As it has already been pointed out earlier, in this judgment, the application for rescission of the default judgment was dismissed with costs. Unhappy

with the decision, the defendants lodged an appeal to this court. The appeal is based on a long list of grounds which may, however, be summed up in that the court a quo erred or misdirected itself in dismissing, as it did, the application for rescission of the default judgment.

In my view, court rules are there to assist the court to run its business smoothly. They cannot be breached with impunity. As it has been shown, in the course of this judgment, the defendants had breached virtually every rule relating to the time limit for the filing of court processes. On this ground alone the defendants cannot be heard to say the trial court was wrong in dismissing, as it did, their application for rescission of the default judgment.

The appeal is dismissed with costs. However, regard being had to the assessment I have made in the course of the judgment, the damages recoverable to plaintiff will be in the total amount of M554-00 calculated as follows:

M500-00 as general damages for the assault.

M54-00 as special damages for medical expenses.

B.K. MOLAI
JUDGE.

18th June, 1996.

For Appellant: Mr. Sello
For Respondent: Mr. Mafisa.