CIV/T/565/92
CIV/APN/257/95

IN THE HIGH COURT OF LESOTHO

In the matter between

MICHAEL MPHETA RAMPHALLA **APPLICANT/DEFENDANT**

and

BARCLAYS BANK PLC **1ST RESPONDENT/PLAINTIFF**

DEPUTY SHERIFF (Mr. L. Matete) **2ND RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi,
Judge, on the 5th day of February, 1997.

This is an application for stay of execution and rescission of default judgment granted by this Honourable Court on 29th March 1993. The application was brought as a matter of urgency on 27th July, 1995 in the following terms:-

"Directing that a Rule Nisi be issued, returnable on a date to be determined by the court calling upon the Respondents to show cause, if any, why:

(a) the execution and sale of the house of the Applicant Defendant, situated on Plot No. 12292-285 at White City to be held on Saturday 29th July 1995 should not be stayed pending the finality of this matter;

(b) the judgment obtained by default should not be set aside as irregular;

(c) the 1st Respondent Plaintiff shall not be ordered to pay the costs of this action in the event that it opposes this application.

(d) this Honourable Court may not grant Applicant further and/or alternative relief."

On 29th July, 1995 a Rule Nisi was granted as prayed returnable on 21st August 1995. After several postponements and extensions of the Rule the matter which has been opposed by 1st Respondent/Plaintiff was finally argued before me on 14th October 1996 and 16th December 1996 respectively. I must also mention at this stage that there is no evidence before me that the 2nd Respondent was ever served with the application papers in the present matter and consequently I presume that it is precisely for that reason that he has not filed any opposing papers. It is also common cause that the said Deputy Sheriff is no longer in the service of this court.

At the commencement of the hearing before me Mr. Malebanye for 1st Respondent/Plaintiff raised two points in limine to the following effect:

1. that no security for costs has been paid. Indeed this is common cause and Mr.Mda for the Applicant/Defendant has conceded this point;

2. that the application is time barred.

Mr.Mda submits however that this application is not brought in terms of Rule 27 of the High Court Rules which prescribes payment of security for costs as a pre requisite for rescission of default judgment but that it is brought in terms of Rule 45 (1) of the High Court Rules which reads thus:-

> "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;
>
> (b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (c) an order or judgment granted as a result of a mistake common to the parties."

In the circumstances I ruled as a matter of convenience that the points in limine be argued together with the merits of the application.

see <u>Basotho National Party vs The Management Board, Lesotho Highlands Revenue Fund and 2 Others CIV/APN/335/95</u>

I turn now to deal with the facts of the application before me.

The 1st Respondent/Plaintiff issued summons against the Applicant/Defendant on 3rd November 1992 claiming payment of M58,676.86 plus interest at the rate of 28% together with costs arising from a certain loan agreement between the parties.

On 15th January 1993, the Deputy Sheriff of this court one L. Matete filed a return of service in this matter to the following effect:

> "the defendant is unknown by the people of Katlehong. Please give me the correct address."

Then on 23rd February 1993 the said Deputy Sheriff L. Matete filed another return of service with the Registrar of this court couched in the following terms:-

> "<u>In the High Court of Lesotho at Maseru</u> CIV/T/565/92
>
> In the matter between

Barclays Bank PLC Plaintiff

and

Michael Mpheta Ramphalla Defendant

I, L. Matete Deputy Sheriff of the High Court of Lesotho and much as entrusted with the service of the court processes state that:

> You are hereby informed that defendant was on the 22 day of 2-93 served with summons thereby delivering/affixing a copy.
>
> Nature and exigency thereof was explained to him personally at same time as the service he did not sign in receipt thereof."

Then follows the signature of the Deputy Sheriff in question and significantly that of the Registrar of the High Court as well as the latter's "approval" stamp dated 23rd February 1993.

Armed with the aforesaid return of service plaintiff's attorney then obtained default judgment in the matter on 29th March 1993 in as much as there was still no appearance to defend entered by the Applicant/Defendant by then.

As judges considering applications for default judgment invariably satisfy themselves as a matter of practice that defendants have been properly

served before granting such judgment against them I am of the view that the learned judge who granted the default judgment in this matter was fully alive to the aforesaid return of service of 23rd February 1993 and was fully justified in relying upon it. I find that the said return of service was in fact prima facie proof of service. In fairness to Mr. Mda he conceded as much, as indeed he was obliged to in the circumstances of the case.

Mr.Mda submits however that the learned Judge who granted default judgment was unaware that at the time he did so the Applicant/Defendant had not in fact been served with summons in the matter as alleged by the Deputy Sheriff.

Consequently he submits that the default judgment in the matter was "erroneously granted" in the absence of the Applicant/Defendant hence a reliance under Rule 45 (1) of the High Court Rules in this application.

The term "erroneously granted" was defined by White J in Nyingwa v Moolman No. 1993 (2) S.A. 508 AT 510 in the following terms:-

> "It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if he had been aware of it, not to grant the judgment."

I am in respectful agreement with this judgment.

It is also correct in my view that once the court comes to the conclusion that judgment was erroneously granted in the absence of any party affected thereby then an applicant need not establish, in addition, good cause for the rescission which must be granted without any further enquiry.

Topol and Others v L.S. Group Management Services (Pty) Ltd. 1988 (1) S.A. 639.

The crisp question for determination in the case before me as I see it, therefore, is whether the default judgment granted on 29th March 1993 as aforesaid was erroneously granted within the meaning of Rule 45 (1) of the High Court Rules. In this regard I have already found that the return of service dated 23rd February 1993 upon which the default judgment was based was prima facie proof that the Applicant/Defendant was served with the summons in the matter.

In Doti Store v Herschel Foods (Pty) Ltd 1982-84 LLR 338 at 339 Mofokeng J (as he then was) had this to say following Deputy Sheriff Witwatersrand v Goldberg 1905 T.S. 680:-

> "Moreover, the return of a sheriff or authorised person to perform his function is prima facie evidence stated therein. The clearest evidence must be adduced if it is disputed."

I respectfully wish to adopt these remarks in the present matter and it is upon that basis that I proceed then to determine whether the

Applicant/Defendant has succeeded, on a balance of probabilities, to rebut by clearest and most satisfactory evidence the presumption that he was in fact served with the summons in the matter.

see Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa: 3rd Edition p 223.

See also Deputy Sheriff Witwatersrand v Goldberg (supra) at p 684 where Solomon J put the principle succinctly in the following words:

> "It is, I think, clear, in the first place, that if the return can be impeached it can only be impeached on the clearest and most satisfactory evidence."

In my judgment the onus of proof is on the Applicant/Defendant in that regard.

The Applicant/Defendant avers as follows in paragraph 5 of his founding affidavit:-

> "5.1 Further to exacerbate my position and more severely to prejudice my case, I only became aware that default judgement was obtained by First Respondent Plaintiff against me when I saw a Notice of Sale in Execution in the press (Lesotho Today) two weeks ago stating that my house would be put up for public auction on Saturday 29 July 1995, as a result of which Notice I directly proceeded to the Chambers of the Registrar of the High Court to ascertain what had happened.
>
> 5.2 I discovered that summons and various writs i.e. Notice of Attachment and Writ of Execution were alleged to have been served on me; but in fact I was never served with

any such process. A copy of a return of service of civil process which I obtained from the Registrar's Chambers bears a stamp of approval dated 31/01/94 and the name of the Deputy Sheriff appearing thereon is that of Mr. L. Matete who in his description of the house states that the house has two bedrooms while in fact there are three bedrooms in that house. I beg leave to annex this copy and mark it Exhibit 2.

5.3 It seems rather incongruous that the default judgement was entered by the Registrar on 3 May 1993 as also the Writ of Execution, but the Writ of Attachment was entered by the Registrar on 30 November 1993. The significance here is that the Writ of Attachment indicates that judgment was obtained on 29 March 1993, for what it is worth.

5.4 The point that I wish to make under this paragraph 5 in all its sub-paragraphs is that the balance of probabilities suggests that the default judgement seems from a careful perusal of the Registrar's records to have been obtained fraudulently especially for the reason that I was never served with any papers whatsoever."

I observe straight away that the Applicant/Defendant makes a bare denial that he was ever served with the summons in the matter. He has not filed any supporting affidavit in so far as the question of service or lack thereof is concerned. He does not give particulars from which the court can determine the issue such as his whereabouts at the time of the alleged service on 23rd February 1993; whether he was outside the country or not or generally why he could not have been served with the summons as alleged.

Be that as it may it is significant that the allegations by Applicant/Defendant are denied in paragraph 9 of the opposing affidavit of Vernon Kennedy who deposes therein as follows:

> "9. RE PARA 5.1 I take the greatest exception to an allegation of the nature which is now being made. With the greatest of respect, the Applicant/Defendant is lying when he indicates to your Lorsdship, under oath, that he only became aware that the Default Judgment was obtained when he saw the Notice of Sale in Execution in the Press, two weeks ago. As has been exhaustively pointed out to your Lordships elsewhere, the Deputy Sheriff properly served the Summons on the Applicant/Defendant personally and the house which forms the subject matter of the dispute has been advertised for public auction previously.
>
> RE PARA 5.2 Again, the contents of this sub-paragraph are not t rue. There is no doubt that the Defendant has been personally served the Summons and he is perfectly aware of the Judgment against him. It is irrelevant that the Registrar's stamp bears an approval date 31st January 1994. The fact of the matter is that the Deputy Sheriff has attempted to execute a Warrant of Execution against Movables, the return of which is a Nulla Bona Return and clearly, the Applicant/Defendant must have been aware of the Judgment against him since 1993.
>
> AD PARA 5.3 The contents of this sub-paragraph are noted but are irrelevant and argumentative in nature.
>
> AD PARA 5.4 I deny that the Default Judgment could have been obtained by fraud. This is an outrageous suggestion and is a slur on the professional integrity of the Bank's Attorneys and is rejected with the contempt that it most manifestly deserves."

I find it extremely significant that in his replying affidavit Applicant/Defendant does not deal with the aforesaid paragraph 9 of the opposing affidavit of Vernon Kennedy. He does not deny the serious allegations contained therein to the effect that he was "properly" and "personally" served with the Summons. In the circumstances I find that this is a fit case where the version of the Respondent should be preferred to that of the Applicant in accordance with the principle laid down in Plascon - Evans Paints v van Riebeeck 1984 (3) S.A. 623 (A).

See also National University of Lesotho Students Union v National University of Lesotho and 2 others C of A (CIV) NO.10 of 1990.

In my judgment the subsequent conduct of the Applicant/Defendant after the default judgment was granted in the matter is also important in determining whether he was served with the summons and thus took a deliberate decision not to defend the action.

In this regard Vernon Kennedy deposes in paragraph 4 of his opposing affidavit that after judgment was obtained against the Applicant/Defendant a series of meetings and correspondence took place in which the latter attempted to settle payment of the judgment debt. Such meetings and correspondence were between Applicant/Defendant and 1st Respondent/Plaintiff's attorneys as well as Lesotho Bank and Lesotho Building Finance Corporation.

Once more it is significant that Applicant/Defendant does not deny the contents of paragraph 4 of the opposing affidavit of Vernon Kennedy. He does not deny that during the course of his negotiations for settlement as aforesaid he even at one stage agreed to sell the house in question to one Mr. Sello by private treaty and that 1st respondent's attorneys wrote him a letter Annexture "G1" requesting him to sign an affidavit authorising them to sell the property. This was on the 4th May 1994.

In particular the Applicant/Defendant does not deny that on 8th June 1994 the 1st Respondent/Plaintiff's attorneys wrote him a letter Annexture "L" which reads as follows:-

> "For the attention of Mr. Mike Ramphalla
>
> White City
>
> Maseru
>
> SCH/mn/B878
>
> RE: BARCLAYS BANK PLC VS YOURSELF - CIV/T/565/92
>
> We refer to the above mentioned matter and confirm the following:
>
> (1) that on the the (sic) 7th May 1994 you called at our office, and together with Mr. Sello, agreed that you would sell to him your property known as Plot No.12292-285, White City, Maseru, by private treaty for the sum of M75,000.00 and that

such funds would be paid to Barclays Bank PLC in reduction of your indebtedness to them.

We accordingly enclose, herewith, a copy of the Deed of Sale which we have drafted for your perusal. Should you find this Deed in order, we shall attend upon you in order that the original Deed of Sale, together with the transfer documents may be signed by you so that this matter may proceed.

We trust that this will not inconvenience you in any way during your illness.

Yours faithfully
HARLEY AND MORRIS."

There is again the aspect of the various writs of execution in the matter. It is not seriously disputed that on the 12th April 1993 the 1st Respondent's attorneys issued a writ of execution against Applicant/Defendant's movables. The response to this was a Nulla Bona return of service filed by the Deputy Sheriff on the 28th October, 1993.

Then followed a writ of execution against Applicant/Defendant's immovable property on 12th November 1993. The return of service thereof was filed on 31st January 1994 and it reads:-

"In the High Court of Lesotho at Maseru CIV/T/565/92

In the matter between

Barclays Bank	Plaintiff/Applicant
and	
M.M. Ramphalla	Defendant/Respondent

I L. Matete Deputy Sheriff of the High Court of Lesotho and such as entrusted with the service of he court processes state that:-

> Copy of the writ was served upon the defendant personally and I attached 1 residential house - Description of the house:- 1 Kitchen, 1 dinning room, 1 toilet room, two bed rooms."

The service is alleged to have been effected on 28th January 1994. As earlier stated I consider that the return of service by the Deputy Sheriff is prima facie proof that the Applicant/Defendant was served with the aforesaid writs of execution.

It is further significant that the property in question was duly advertised for sale in a local newspaper and in the Government Gazette on the 7th May 1994 n terms of Annextures "E" and "F" respectively. Nor does the Applicant/Defendant deny the material allegation in paragraph 4 of Vernon Kennedy's opposing affidavit that because of the negotiations between the Applicant/Defendant and 1st Respondent/Plaintiff the latter's attorneys "accordingly canceled the Sale which was due to take place on the 6th of May 1994 by addressing a letter to the Registrar of the High Court." Annexture "I" to the following effect:-

> "The Registrar
> The High Court
> Maseru
>
> 6th May 1994
>
> Dear Sir

RE: BARCLAYS BANK PLC VS M M RAMPHALLA - CIV/T/565/92 - SALE OF PLOT NO.12292-285 BY PUBLIC AUCTION ON SATURDAY 7TH MAY 1994.

We respectfully refer to the above mentioned matter and wish to advise that the Defendant has agreed to the sale of the above mentioned property by private treaty.

We therefore advise you that we wish to cancel the sale by public auction tomorrow. By copy of this letter, we shall inform the Messenger involved, Mr. Matete, of the cancellation of the sale.

Yours faithfully
HARLEY AND MORRIS

C.C. Mr. Matete

Received a copy hereof this
6th day of May 1994.

MR. MATETE."

In the circumstances therefore I find that the evidence is indeed overwhelming on probabilities that the Applicant/Defendant was aware of the default judgment in the matter as far back as 1993. I reject as false therefore his allegation that he only became aware of the default judgment on 29th July 1995.

I also find that at no stage since becoming aware of the default judgment in 1993 or at any time thereafter did the Application/Defendant ever raise the issue that he was never served with summons in the matter. The first time he raised this issue was in July 1995 when he filed the present application for rescission. I am of the view that if he had not been served with the summons at all he would have certainly raised the issue at an early stage. As it is the Applicant/Defendant has waited for about two years to raise this issue. In my view this is a factor which the court is entitled to take into account against the Applicant/Defendant in the matter.

In all the circumstances of the case therefore I have come to the conclusion that the Applicant/Defendant was properly served with summons in the matter and that consequently the default judgment granted against him on 29th March 1995 was not erroneously granted. That being so this application must fail.

I find that the Applicant/Defendant ought to have paid security for costs in terms of Rule 27 of the High Court Rules and that the application is time barred in terms of the said Rule in as much as it was filed more than twenty-one days after the Applicant/Defendant had knowledge of the default judgment against him.

I further find that the Applicant/Defendant ought to have shown good cause or a bond fide defence in his papers in terms of the said Rule 27 of the High Court Rules. Yet on the contrary he clearly concedes his indebtedness

to 1st Respondent/Plaintiff in paragraphs 3 and 4.8 of his founding affidavit wherein he deposes as follows:

> "3. First Respondent and I entered into an agreement whereby it advanced and lent me certain monies to build a house in accordance with its policy.
>
> 4.8 I strongly contend further that it is this purported unlawful dismissal that has frustrated me and rendered it impossible for me to meet my obligations under the loan agreement I had entered into with First Respondent/Plaintiff to enable me to build my house."

One has sympathy with the Applicant/Defendant's alleged frustration but regrettably the fact that he is unable to meet his financial obligations merely because he was allegedly dismissed unlawfully by 1st Respondent/Plaintiff from work is, in my judgment, no defence to the latter's claim in the matter.

In the result therefore the Rule is discharged and the application dismissed with costs.

M.M Ramodibedi

JUDGE

For Applicant/Defendant : Mr. Mda
For 1st Respondent/
Plaintiff : Mr. Malebanye