CIV/APN/310/97
CIV/APN/257/95
CIV/T/565/92

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
on the 10th day of September 1997.

On the 27th August 1997 the Applicant filed a "Notice of Motion - Ex Parte" with the Registrar of this Honourable Court asking for an order couched in the following terms:

"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 30th August 1997 should not be stayed pending the

outcome of an appeal in C of A (CIV No.8 of 1997).

b) The 1st Respondent/plaintiff shall not be ordered to pay costs of this application in the event of opposing it.

c) This Honourable Court may not grant applicant further and alternative relief.

2.

That this rule operate with immediate effect as an interim order directing 1st Respondent/plaintiff as prayed at paragraph 2 (a) (sic)."

On the 28th August 1997 the matter was apparently brought before my Brother Lehohla J who however, thanks to the diligence of the Learned Judge, *declined to deal with the matter and transferred it to this Court for obvious reasons* that it is this Court that delivered the judgment that has been appealed from.

On the same day namely the 28th August 1997 the matter finally came before me and I reluctantly issued a Rule Nisi returnable on 29th August 1997 calling upon the Respondents to show cause why prayer (a) in the Notice of Motion shall not be granted. I specifically declined from granting prayer 2(a) of the Notice of Motion and insisted that the papers be served upon the Respondents.

Amazingly when the matter was finally argued before me on the return date namely the 29th August 1997 I observed that the typed "Interim Court Order" filed of record included prayer 2 in the following words:

"2

That this rule operate (sic) with immediate effect as an interim order directing 1st Respondent/Plaintiff as prayed at paragraph 1(a)."

The reference to prayer 1(a) was obviously a reference to prayer (a) of the Notice of Motion. What this then meant was that a false impression was created that this Court had actually ordered that execution and sale of the Applicant's house in question be stayed as an interim order. Nothing could however be further from the truth and in due course Mr. Lesuthu for the Applicant tendered his apology. The Court was certainly not amused.

In Attorney-General v Dlamini Holdings (Pty) Ltd. CIV/APN/7/97 - CC/1002/96 I had occasion to state the following:

".....legal practitioners must always ensure that the orders they seek have actually been granted by the court before including them in the typed court order. By the same token it is the responsibility of those whose duty it is to sign court orders to ensure that such court orders accurately reflect what the court itself actually ordered. Failure to exercise due diligence in this regard will often result in a miscarriage of justice as this case amply demonstrates."

I decern the need to repeat the warning. Nor is this Court amused by the slovenly manner in which this application has been presented. As is apparent from the Notice of Motion there is no specific prayer for a Rule Nisi as such. Worse still there is no prayer to dispense with the rules and modes of service on account of urgency nor is there any attempt to justify such urgency in the founding affidavit

itself.

I should also mention that I was struck by the paucity of allegations in the Applicant's founding affidavit necessary to substantiate an application for stay of execution. I think it would be fair to say that in my experience both as a practising member of the Bar and Side Bar and as a judge it is hard to recall any worse skeletal case than the instant one. The whole case comprises of twelve (12) paragraphs of short single sentences contained in the Applicant's founding affidavit. It proves convenient to reproduce the affidavit in whole:-

"1.

I am an applicant herein a mosotho adult of Katlehong in the district of Maseru.

2.

First Respondent Plaintiff is Barclays Bank PLC, a banking institution duly registered and incorporated as such in terms of laws of the United Kingdom and carrying on business as bankers both in the United Kingdom and in the Kingdom of Lesotho at Kingsway Maseru.

3.

Second Respondent is a Deputy Sheriff of the High Court of Lesotho.

4.

The facts deposed to herein are to the best of my knowledge and belief true and correct.

5.

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.

6.

On the 8th August 1991 I received a letter from the first defendant plaintiff purporting summarily to dismiss me from its employ on the grounds that I had engaged in an illegal strike since Monday 22 July 1991.

7.

Defendant obtained a default judgment against me.

8.

I applied for rescission so as to be heard and after the matter was argued by both sides I lost.

9.

I then appealed to the court of appeal in C of A (CIV NO.8 of 1997).

10.

I have been informed recently that my house is to be executed on the 30th August 1997.

11.

I now apply for stay of execution pending the outcome of the court of appeal case.

12.

I have prospects of success in that the judgment against applicant was erronously (sic) obtained."

As is apparent from this affidavit no attempt was made to annex the grounds of appeal in order to enable the Court to gauge prospects of success on appeal. Yet amazingly on the 29th August 1997 when the matter was argued before me Mr. Lesuthu had sneaked in two "annextures" without leave of the Court. These were Annexture "A" being a Notice of sale in execution of the Applicant's house and Annexture "B"being a photostatic copy of the Notice of Appeal. Once more the Court disapproves of this underhand practice.

I turn then to deal with the general principles involved in an application for stay of execution pending appeal. In this regard it is necessary to bear in mind the provisions of Rule 6 of the Court of Appeal Rules 1980 in the following terms:-

"6 (1) Subject to the provisions of the sub-rules infra the noting of an appeal does not operate as a stay of execution of the judgment appeal from.

(2) The appellant may, at any time after he has noted an appeal, apply to the judge of the High Court whose decision is appealed from for leave to stay execution.

(4) On such application the judge of the High Court may make such order as to him seems just and in particular without in any way depriving him of his discretion may order:

(a) that execution be stayed subject to the appellant giving such security as the judge thinks fit for payment of the whole or any portion of the amount he would have to pay if the appeal should fail or

(b) refuse that execution be stayed subject to the Respondent giving security for restoration of any sum or thing received under execution or

© it may order that execution be stayed for a specified time but that after the lapse of such time execution may proceed unless the appellant has within such time furnished security for such sum as the judge may specify.

(d) The judge hearing such application may make such order as to costs as he may think fit." (My underlining)

It is clear from the use of the word may in sub-rule 4 of Rule 6 that the Court has a discretion whether or not to grant an application for stay of execution depending on the circumstances of a particular case. It is trite law however that such discretion is not an arbitrary one but is one that must be reached fairly upon a consideration of all relevant factors. Thus the discretion must be exercised

judicially and not capriciously.

See Lesotho Flour Mills and 2 others v Sehohoana Johannes Kao (CIV/APN/117/97.

As this Court pointed out in that case "the main considerations in an application for stay of execution are whether the Applicant has prospects of success on appeal as well as the balance of hardships or convenience, as the case may be."

See also South Cape Corporation v Engineering Management Service 1977 (3) S.A. 534 A.D. at 545.

I have had a close look at the solitary ground of appeal in this matter. It charges that:-

> "The learned judge erred in holding that rule 45 (1) of High Court Rules was not applicable in the special circumstances of the matter.
>
> He ought to have found that judgment in default against applicant was erronously (sic) obtained."

Perhaps I should pause here to mention that the reason why the Applicant claims that the default judgment was erroneously obtained is that he alleges he was never served with the summons in the matter. As against this allegation there was a return of service filed by the Deputy Sheriff alleging that the Applicant was personally served with the summons on the 22nd February 1993 and that the Deputy Sheriff even explained the nature and exigency of the matter to the Applicant at the same time as service.

It proves convenient at this stage to reproduce the relevant passages in the judgment of this Court appealed from. I do so even at the risk of overburdening this judgment in order to determine whether the Applicant is correct in alleging that the court ought to have found that judgment in default against Applicant was erroneously obtained. This is what the Court said:

> "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. 1991 (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 Service (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 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 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 judgment 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 29th 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 Lordship, 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 true. 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 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 can 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 Dees 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 anyway 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 the 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 in 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 cancelled 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 Applicant/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."

Viewed against the above mentioned background I apprehend that there can be no doubt but that the Applicant failed dismally to rebut by clearest and most satisfactory evidence the presumption that he was in fact served with the summons in the matter.

See Deputy Sheriff Witwatersrand v Goldberg 1905 T.S. 680 at 684

That being the case I find that the Applicant's ground of appeal that this Court "ought to have found that judgment in default against applicant was erronously (sic) obtained" is both misconceived and indeed preposterous. By the same token and in the particular circumstances of the case I find that there are no prospects of success on appeal.

I have also considered the timing of this application against the Applicant in this matter. In doing so I observe that the judgment of this court appealed from was delivered on the 5th February 1997. The Applicant sat back and did nothing until the very last day on which the six weeks period within which to note an appeal expired namely the 19th March 1997 when he filed an appeal with the Registrar of this Court.

Bearing in mind the aforesaid Rule 6(1) of the Court of Appeal Rules 1980 to the effect that the noting of an appeal does not operate as a stay of execution of the judgment appealed from it was, in my view, incumbent upon the Applicant to make a timeous application for stay of execution. Yet he once more sat back and did nothing until apparently a notice of sale of his house was published in the newspapers in July 1997. Even then he conveniently hides the exact date on which he became aware of the sale hiding behind the expression "I have been informed recently that my house is to be executed on the 30th August 1997." Nor is the Court amused by the fact that there is absolutely no explanation for the delay in making the application.

In all the circumstances I have considered the Applicant's application as amounting to nothing more than delaying tactics to the prejudice of the Respondent/Plaintiff who has waited for execution of the judgment in its favour since the 29th March 1993. I am satisfied that to accede to Applicant's request would no doubt bring the court into disrepute in the particular circumstances of this case. The principle justice delayed is justice denied is certainly not an empty slogan.

There is again the aspect that the Applicant has no bona fide defence to the claim by the Respondent/Plaintiff. I have considered this factor against the Applicant. This is so because in paragraphs 3 and 4.8 of his founding affidavit to the original application under Rule 45 the Applicant 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."

As this Court pointed out in its judgment appealed from the fact that the Applicant is unable to meet his financial obligations merely because he was allegedly dismissed unlawfully by Respondent/Plaintiff from work is no defence to the latter's claim in the matter.

Before I close this judgment I would like to add a few observations namely that this case has been slackly presented and that the Applicant was obviously poorly if not ill advised both in the intended appeal and in the instant application. It must be stressed that an application for stay of execution pending appeal is not just there for the mere asking as the Applicant appears to think (or is it his counsel?). The Applicant must set out a full explanation for the delay in making the application if such be the case and he must also state whether there are prospects of success on appeal and give reasons for such a conclusion. In my view it is not enough for the Applicant, as in this case, to merely make a bare unsubstantiated allegation that there are prospects of success and rest.

In the result I have come to the conclusion that the Applicant has failed to make out a case for the relief sought in the Notice of Motion.

Accordingly the application is dismissed with costs.

M.M. Ramodibedi

JUDGE

10th September 1997

For Applicant : Mr. Lesuthu

For Respondents : Mr. Malebanye