CIV/APN/6/96

IN THE HIGH COURT OF LESOTHO

In the matter between

'MAHOPOLANG MOQHALI	**APPLICANT**
and	
EPHRAIM LEPHOLE	**1ST RESPONDENT**
THE MESSENGER OF COURT (Mr. Mphethe)	**2ND RESPONDENT**
THE MAGISTRATE (Mrs. Mokuena)	**3RD RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 22nd day of September 1997.

On the 22nd January 1996 the Applicant obtained a Rule Nisi against the Respondents in this Honourable Court in the following terms:-

"1. The periods prescribed for service be dispensed with a (sic) on the basis of the urgency of this application.

2. That a Rule Nisi issue returnable on the 12th day of January, 1996 calling upon the Respondents herein to show cause, if any why:-

(a) The matter in CC1506/93 shall not be reviewed and the judgment thereon set aside or declared a nullity.

(b) The 2nd Respondent shall not be interdicted and restrained from selling by public auction the property of the Applicant attached and removed pursuant to a warrant of Execution issued pursuant to the said judgment in CC1506/93.

© The said property shall not be released to the Applicant for safekeeping pending the hearing and finalisation of this application.

(d) The 3rd Respondent shall not be ordered to transmit the record of proceedings in CC1506/93 to this Honourable Court within fourteen (14) days of service of process upon him.

(e) The 1st Respondent shall not be ordered to pay costs of this application only in the event of opposition.

(f) This Honourable Court shall not grant Applicant further and/or alternative relief.

3. That prayers 2(b) © and (d) operate with immediate effect as an interim order."

The History of this matter shows that on the 6th December 1993 the First Respondent filed summons against the Applicant in Maseru Magistrate's Court claiming damages in the sum of M5000-00 for defamation arising from an allegation that on or about the 26th August 1993 and at or near Maseru Bus Stop the defendant

(Applicant) wrongfully, unlawfully and with intent to insult and injure plaintiff's dignity and/or to defame plaintiff's character uttered the following words to plaintiff's daughter about or concerning plaintiff "Ha ke sefebe joalo ka ntatao ea robalang le basali ba ileng ngakeng ho eena..." a fair translation of which is "I am not a prostitute like your father who sleeps with his female patients" or words to that effect.

On the 28th January 1994 the Messenger of Court filed a return of service to the effect that the defendant was on the 28th day of January 1994 served with summons by delivering a copy thereof "upon the defendant (sic) younger sister at the address is (sic) given." Apparently this return of service was not approved because on or about the 22nd July 1994 the same Messenger of Court filed yet another return of service in the same matter showing that the defendant was on the 28th January 1994 served with summons by delivering a copy thereof "upon the defendants (sic) younger sister Nthabiseng whom (sic) is over 24 years at the same address and she did not sign." This return of service is Annexture "ELD" to First Respondent's opposing affidavit.

Armed with the latter return of service Annexture "ELD" the First Respondent duly obtained default judgment "as prayed" on the 22nd November 1994. The default judgment was granted by the Third Respondent who was admittedly possessed of jurisdiction in the matter.

It appears from the record of proceedings that on the 5th January 1995 the First Respondent filed a warrant of execution against Applicant's property. The latter has however conveniently withheld from the court the exact date on which he was served with the said warrant of execution. I observe however that he deposed

to the founding affidavit in the instant matter on the 9th January 1996.

I should mention at this stage that the grounds upon which the Applicant relies for review are three in number namely:

(a) that the default judgment was irregular in that it was obtained on the basis of a defective return of service by reason of the fact that the Applicant "never had any sister who was staying with me and that perhaps the summons were (sic) left with someone else, who did not even know me or stayed in the same house as myself" (paragraph 8 of Applicant's founding affidavit).

(b) that the default judgment was "obtained without any evidence being led as to how the damages claimed were computed" (paragraph 10 of Applicant's founding affidavit).

© that First Respondent obtained the default judgment on the basis of inadmissible hearsay evidence adding "For a proper judgment to have been entered, the 1st Respondent should have called his daughter as a witness" (paragraph 13 of Applicant's founding affidavit).

I proceed then to examine Applicant's aforesaid complaints in the sequence tabulated above.

(a) <u>That the return of service was irregular.</u>

As earlier stated the return of service Annexture "ELD" clearly shows that service of the summons in the matter was effected upon the defendant's younger sister Nthabiseng who is over 24 years at the address given. The Applicant does not deny that she lives at the address given in the summons.

Now it is trite law that the return of service of a sheriff or duly authorised person to perform his function is prima facie evidence of what it states and that therefore the clearest and most satisfactory evidence must be adduced if it is disputed.

See **Doti Store v Herschel Foods (Pty) Ltd. 1982-84 LLR 338 at 339 per Mofokeng J (as he then was).**

See also **Michael Mpheta Ramphalla v Barclays Bank and Another CIV/T/565/92**
CIV/APN/257/95 (unreported)

Indeed in Deputy Sheriff Witwatersrand v Goldberg 1905 T.S. 680 at p 684 Solomon J put the principle succinctly as follows:-

> "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."

As I had occasion to state in Michael Mpheta Ramphalla v Barclays Bank and Another (supra) the onus of proof is on the Applicant/Defendant in that regard. The question that arises then is has the Applicant discharged this onus?

As earlier stated it should be observed at the outset that the Applicant merely

contends herself with a bare unsubstantiated allegation that she never had any sister who was staying with her. She does not even categorically deny in here founding affidavit ever having a sister called Nthabiseng or any sister at all. One would have imagined that if there was any truth in Applicant's denial it would have been a simple thing for here to obtain supporting affidavits from her relatives particularly her mother in support of her denial. There is simply no explanation why this was not done at least in the replying affidavit particularly since Applicant's allegation that she never had any sister who was staying with her was clearly denied by the First Respondent in paragraph 6 of his opposing affidavit.

Besides Applicant's relatives I consider that no man is an island. Accordingly it is my view that if Applicant's version is to be believed that she has never stayed with a younger sister called Nthabiseng she could quite easily have made use of supporting affidavits from her neighbours or even from the local Chief to that effect. Once more there is no explanation why this was not done.

In the circumstances I am compelled to the conclusion that the Applicant has failed dismally to impeach the aforesaid return of service Annexture "ELD" by the clearest and most satisfactory evidence.

Deputy Sheriff Witwatersrand v Goldberg (supra).

Accordingly the Applicant's complaint that the default judgment was irregular in that it was obtained on the basis of a defective return of service must fail.

(b) That the default judgment was obtained without any evidence being led as to how the damages claimed were computed.

I observe that the Applicant gives a false impression in his founding affidavit that no evidence was led at all in the matter. In this regard he states in part as follows in paragraph 11 of his founding affidavit:

> "11
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> In this respect I submit that the said judgment which was entered without any evidence is a nullity and ought to be set aside....."

Yet contrary to this allegation the record of proceedings shows that the First Respondent actually filed his own affidavit as well as that of his daughter Malisemelo Masike in support of his application for default judgment in the matter. Obviously this was in terms of Rule 4(4) of Order No. X of the Subordinate Court Rules which provides as follows:-

> "The clerk of court shall refer to the court any request made under Rule 2 or Rule 3 of this Order for the 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."

In his affidavit the First Respondent describes himself as a homeophathist by profession. He treats patients all over the country. He avers that the words uttered by the defendant (Applicant) in the matter were uttered with intent to insult him and to injure his dignity as well as to defame him. He avers further that the said words were not only virulently malicious and false but they have most unfortunately hurt his feelings and his dignity "very deeply". His business has greatly suffered as a

result of those false statements. He adds that he has since the said utterances "been confronted by men who said I shall no longer treat their wives." He concludes by making the necessary averment that "a sum of M5000-00 would be a fair compensation for the hurt I have endured and the damage to my reputation that I have suffered."

I consider that an award of damages for general damages such as is the case here is a matter preeminently within the discretion of a trial court. In all the circumstances of the case I remain unpersuaded that the learned trial Magistrate failed to exercise her discretion properly. I consider that this was a very bad case of defamation against a man of First Respondent's status namely a practising homeophathist. I consider that the sum of M5000-00 was on the lenient side for that matter. Accordingly the Applicant's complaint in this regard must also fail.

© that First Respondent obtained the default judgment on the basis of inadmissible hearsay evidence.

As earlier stated this complaint is premised on the misconception that the First Respondent did not make use of the evidence of his daughter and thus relied on hearsay evidence. Nothing can be further from the truth. As earlier stated the Applicant duly filed the affidavit of his aforesaid daughter Malisemelo Masike in support of his claim. Accordingly I find that there is no merit in this complaint as well.

Before I close this judgment it is appropriate to add a few observations on a point which has given rise to the deepest concern, certainly in my mind. It is this.

There is a growing tendency for litigants and legal practitioners to bring matters which are essentially rescission applications within the Magistrates' Courts jurisdiction to this Honourable Court without leave of the Court in terms of Section 6 of the High Court Act 1978 which reads thus:

> "6. No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court) shall be instituted in or removed into the High Court, save -
>
> (a) by a judge of the High Court acting of his own motion; or
> (b) with the leave of a judge upon application made to him in Chambers, and after notice to the other party."

The instant case is a typical example of this sorry practice which I consider to amount to abuse of court process.

In this regard it is necessary to bear in mind Order No. XXVIII of the Subordinate Court Rules which appropriately bears the heading "REVIEW OF JUDGMENTS AND ORDERS." Rules 1 and 2 thereof read as follows:-

> "1. (1) Any party to an action in which a default judgment is given may within one month after such judgment has come to the knowledge of the party against whom it is given apply to the court to rescind or vary such judgment.
>
> (2) Every such application shall be on affidavit which shall set forth shortly the reasons why the applicant did not appear

and the grounds of defence to the action or proceeding in which the judgment was given or of objection to the judgment.

(3) Save where leave has been given to defend as a pauper under Order V, no such application shall be set down for hearing until the applicant has paid into court, to abide the directions of the court, the amount of the costs awarded against him under such judgment and also the sum of four rands as security for the costs of the application: Provided that the judgment creditor may by consent in writing lodged with the clerk of the court waive compliance with this requirement.

(4) Unless the applicant proves to the contrary, it shall be presumed that he had knowledge of such judgment within two days after the date thereof.

2. (1) The court may on the hearing of any such application, unless it is proved that the applicant was in wilful default, and if good cause be shown, rescind or vary the judgment in question and may give such directions and extensions of time as may be necessary in regard to the further conduct of the action or application.

(2) The court may also make such order as may be just in regard to moneys paid into court by the applicant.

(3) If such application is dismissed, the default judgment

shall become a final judgment."

To my mind I am satisfied that a party cannot be allowed to escape the consequences of these rules by simply bolting to the High Court as it were. Such consequences are

(a) the time limit of one month after default judgment
(b) the need to show that failure to enter appearance to defend was not wilful
© the need to show a bona fide defence
(d) payment of security for costs.

I apprehend that there can be no doubt that these rules were meant to ensure that frivolous applications for rescission of default judgments are not permitted to delay execution of lawfully obtained judgments to the prejudice of the successful litigants.

It is true there may be fitting cases deserving of review by the High Court such as for an example lack of jurisdiction by a Magistrate's Court. Barring such clear cases of review by the High Court, however, this court will in future not hesitate to dismiss applications which are within the jurisdiction of the Magistrates' Courts unless leave of the Court be first sought and obtained.

In all the circumstances of the case therefore I am satisfied that the Applicant has failed to make out a case for the relief sought.

Accordingly the Rule is discharged and the application dismissed with costs

to First Respondent.

M.M. Ramodibedi

JUDGE

22nd September 1997

For Applicant : Mr. Putsoane
For Respondent ; Mr. Mohau