

**CIV/APN/437/2011**

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**‘MALEBOHANG KOENYAMA**

**1<sup>st</sup> Applicant**

**TLALA KOENYAMA**

**2<sup>nd</sup> Applicant**

**and**

**MAKHALE LEBAKA**

**1<sup>st</sup> Respondent**

**HER WORSHIP THE MAGISTRATE**

**MRS M.G. MOKHORO**

**2<sup>nd</sup> Respondent**

**THE CLERK OF COURT**

**3<sup>rd</sup> Respondent**

**THE MESSENGER OF COURT**

**4<sup>th</sup> Respondent**

**THE ATTORNEY-GENERAL**

**5<sup>th</sup> Respondent**

**Coram: Hon. Hlajoane J**

**Date Hearing: 27<sup>th</sup> February, 2012.**

**Date of Judgment: 26<sup>th</sup> March, 2012.**

**Summary**

*Judgment granted by default for failing to file appearance to defend and filing plea – Magistrate rescinding judgment for failing to file plea but*

*refusing to rescind for failing to file appearance to defend – Whether proper to go by way of review or by appeal – No procedural irregularity – Application for review dismissed with costs.*

[1] This is an application for review against the decision by the 2<sup>nd</sup> respondent herein.

[2] The 1<sup>st</sup> respondent had instituted a claim for damages for pain and suffering, contumelia, disfigurement, loss of amenities of life and medical expenses against the five defendants. 1<sup>st</sup> and 2<sup>nd</sup> Applicants were 4<sup>th</sup> and 5<sup>th</sup> defendants respectively in that case, CC897/2009.

[3] The parties in that CC897/2009 were the following:

Makhale Lebaka	Plaintiff
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And

Mabatho Monyane	1 <sup>st</sup> Defendant
Moalosi Ramoreboli	2 <sup>nd</sup> Defendant
Monyane Monyane	3 <sup>rd</sup> Defendant
Tlale Koenyama	4 <sup>th</sup> Defendant
‘Malebohang Koenyama	5 <sup>th</sup> Defendant

- [4] The defendant had been dully served with the summons on the 26<sup>th</sup> August, 2009. The intention to oppose was only filed by the 1<sup>st</sup> and 3<sup>rd</sup> defendants.
- [5] Though 1<sup>st</sup> and 3<sup>rd</sup> defendants filed their intention to oppose the proceedings timeously they however failed to file their plea timeously and were thus barred from making any further pleadings. The other defendants never filed anything.
- [6] Default judgment was thus granted against all the five defendants on the 28<sup>th</sup> October, 2009, with interest and costs of suit.
- [7] Warrant of Execution against Property was issued and served on all the defendants as execution debtors on the 11<sup>th</sup> February, 2011.
- [8] It was after the service of the Warrant of Execution against the defendants that those defendants at the trial stage with the exception of 2<sup>nd</sup> defendant, Moalosi Moreboli, filed an application for rescission and stay of execution.
- [9] The magistrate who handled the matter, the present 2<sup>nd</sup> respondent made her decision granting rescission in respect of Mabatho Monyane and Monyane Monyane only, and dismissed the

application for rescission in respect of Tlale Koenyama and 'Malebohang Koenyama.

[10] It is that decision which the applicants in this case are asking the Court to review and set aside. They have also prayed for stay of execution.

[11] In his argument counsel for the applicants pointed out that it was the fault of counsel for the defendants at the trial who failed to file notice of appearance to defend. This comes from counsel before this Court not counsel who represented them at the trial stage. That would surely be tantamount to giving evidence from the bar in the absence of any affidavit from counsel who actually dealt with the matter.

[12] Counsel argued further that the magistrate must have divided the amount between those against whom judgment was granted and those who were allowed to file their plea.

[13] He further showed that the magistrate did not consider other factors but only that no appearance to defend was filed.

- [14] The response by the respondent's counsel has been that the reasons advanced by the applicants for bringing this application for review are not for review but appeal as they concede there are no irregularities complained of.
- [15] The reason for dismissing the rescission was as it is based on the merits of the case, as the applicants had failed to defend their case. As put by respondent's counsel, applicants were not or showed no interest in the matter, not because there was any procedural irregularity. Granting default judgment where a party has failed within the stipulated periods to file notice of appearance to defend is procedurally correct.
- [16] The magistrate showed in her ruling that though applicants wanted to claim to have filed appearance to defend, there was no proof that that was the case.
- [17] On the question of magistrate not showing how much the applicants are supposed to pay, I find this to be just a trick to delay the process as the order has clearly shown how much is to be paid.
- [18] What is important is that the granting of default judgment was perfectly in order. Also the rescission against those that failed to

file their plea was perfectly in order. The Court could not have waited for the applicant to file appearance to defend when they have failed to do that within the time prescribed.

[19] Whether or not there still remains other defendant allowed to file their plea is not anything that must have stopped the magistrate in allowing judgment that was granted by default to still stand against the applicants.

[20] If the applicants wanted to challenge the decision arrived at by the magistrate, the correct approach would have been by way of an appeal and not a review.

[21] Though the rationale between bringing proceedings under review or appeal is the same, being to have the judgment set aside, but the grounds for each of the two are different and cannot even confuse one for the other.

[22] For the applicants to be saying they might pay the whole of the amount claimed before others whom they were sued together proceed with their case to finality, the answer to that is that even if that were to happen, they would still under the law have a remedy open to them against the other defendants.

[23] The magistrate could not have apportioned payment of such damages to also include others against whom judgment has not been given.

[24] For the reasons given above, I find that this ought to have been a case for appeal and not review.

[25] The application is thus dismissed with costs.

**A. M. HLAJOANE**  
**JUDGE**

For Applicants:

Mr Lesenyeho

For Respondents:

Mr Mohanoe