

IN THE HIGH COURT OF LESOTHO

In the matter between:-

‘MATAU MONETHI	1st Applicant
TAU MONETHI	2nd Applicant
NALELI TEKANE	3rd Applicant
MOTHEBESOANE MAKOANE	4th Applicant

And

LIKOLOBE TSIETSI	1st Respondent
MESSENGER OF COURT	2nd Respondent

JUDGMENT

Coram: Hon. Hlajoane J
Date of Hearing: 11th December, 2012
Date of Judgment: 13th February, 2013

Summary

Application for rescission-whether absolution from the instance a final decision-Whether can plead res judicata where absolution from the instance granted-Requirements for granting application for rescission-Rescission granted.

- [1] This is an application for rescission of a judgment that was granted by default on the 20th August, 2012 as the Applicants being the defendants then had failed to file their notice of appearance to defend the action.
- [2] It would be interesting to mention at this stage that the present 1st Respondent was once an Applicant before the Maseru Magistrate's Court in a CC 947/91. The 2nd Applicant and another were the Respondents. The Applicant was asking the Court to order the Respondents to desist from building on the field in question. The Court after turning the application into a trial ordered absolution from the instance in 1993.
- [3] Judgment in this case was granted by default where the present 1st Respondent had asked the court to order ejectment of the present Applicants from the field in question.
- [4] It would also be interesting to observe that after the magistrate's Court had granted absolution from the instance in 1993 the present Applicant waited for something like twenty-one years (21) before instituting a fresh application for ejectment.
- [5] It would not be proper for the 2nd Applicant in this case to be saying when the magistrate in CC947/91 granted absolution from the instance the matter was dealt with to finality. The institution of

the same matter was still proper as absolution from the instance can never be termed a final judgment.

- [6] In the same vein the 2nd Applicant in *casu* could not be heard to say he would plead *res judicata* as absolution from the instance is not a final judgment.
- [7] Looking at the case at the trial stage, summons had been served on the 1st Respondent in this case on the 24th July, 2012. Appearance to defend ought to have been entered within fourteen days after service of the summons. The fourteen days had lapsed when the Court was approached for the granting of the default judgment on the 20th August, 2012.
- [8] What this court is being asked to determine is whether Applicants have satisfied the requirements for rescission. Many considerations have to be looked into here such as;
- (a) Whether default was willful.
 - (b) Whether there is *bona fide* defence.
 - (c) Prospects of success.
- [9] Applicant's counsel referred the Court to the case of **Napo Thamae and one v Agnes Kotelo and one**¹ where it was stated that in rescission application, the court has to consider all factors and not take them in piece meal.
- [10] The Court was told that failure to file appearance to defend on time in this case was due to the negligence of counsel who was complaining of not having been given proper instructions.

Based on the decision in **Thamae and Kotelo** above the Court is not only going to look at that explanation alone but other factors such as prospects of success. The Court further pointed out that good defence may compensate for poor explanation and vice versa.

[11] Applicants have in reply mentioned the name of counsel whom they had instructed to defend the action. They said they had legitimate expectation that counsel was going to defend the matter.

[12] Applicants' counsel referred to the case of **Darries v Sheriff, Magistrate Court, Wynberg and another** where it said;

“Depending upon the circumstances a litigant may have to accept the consequences of his attorney’s flagrant and gross non-observance of rules. But it is certainly not the general rule that the neglect of an attorney, even if serious, should always be visited upon the client.”

[13] Considering the time after service of summons that default judgment was granted and the time it took counsel to apply for rescission, the delay is not that long. And the reasons advanced for the default cannot be said to be unreasonable. Also the sense of what is just dictates that the matter be dealt with on the merits so as to clear the confusion about which field the parties are talking about.

[14] The application for rescission is granted and costs will be costs in the course.

² 1998 (3) S.A. 34 at 44

A.M. HLAJOANE J

JUDGE

For Applicants: Mr. Sekatle

For Respondents: Mr. Sello