

**IN THE HIGH COURT OF LESOTHO**

**CIV/APN/217/2011**

In the matter between:

**KAROHANO MAOENG**

**APPLICANT**

**And**

**MABUTI MAOENG**

**1<sup>ST</sup> RESPONDENT**

**MASTER OF THE HIGH COURT**

**2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

<b>Coram</b>	:	Honourable Acting Justice E.F.M. Makara
<b>Dates of Hearing</b>	:	27 November, 2013
<b>Date of Judgment</b>	:	27 November, 2013

**Summary**

*Rescission application – Deputy Sheriff’s Return of Service not reflective that there had been compliance with Rule 4 (1) and (5) of the Rules of this Court – Creation of doubt as to whether the 1<sup>st</sup> Respondent had been served – Default Judgment set aside and case converted into a trial.*

## CITED CASES

**Tšepo Makatsanyane & Anor vs Motsekuoa Thekiso & Ors C of A (CIV) 23/2004**

## STATUTES

**Government Proceedings and Contracts Act 1965**  
**The Laws of Lerotholi.**

## **MAKARA A.J**

[1] The Court is seized with an application for rescission. This is in consequence of default judgment which had been secured by the first Respondent on 27 June 2011. It is common cause that the applicant had not contested the application.

[2] It transpires from the present application that the Master of High Court and the Attorney General respectively have been joined in the proceedings. This is by operation of law, in terms of Rule 8 (19) which enjoins the applicant where it relates to estate that the 1<sup>st</sup> Respondent and, consequently, by operation of the **Government Proceedings and Contracts Act 1965**, the 2<sup>nd</sup> Respondent has to be made a party in the case. All the respondents have duly been served with the motion papers.

[3] Mr. Mokotleng featuring for the 1<sup>st</sup> Respondent filed his intention to oppose the application and went further to file an answering affidavit.

[4] The matter was argued on 28 November 2013. Mr. Letsika for the applicant motivated the application from the premise that the applicant had not in law been served with the papers in the main and this explains the fact that he did not file his intention to oppose as well as the answering papers. This ultimately culminated in his non-appearance before the Court at the time the main application was moved, hence the entering of the default judgment by Molete AJ (as he then was). The default judgment gave effect to the Will executed by the late mother of the applicant and first respondent. In terms of the Will, the applicant, who is a Customary Law heir to the estate of the parents, was being deprived of his heirship rights.

[5] The applicant's Counsel elucidated his main position that the applicant had not been served with the original application by contending that the service had not complied with imperatives of **Rule 4 of the Rules of the High Court**. He specifically drew to the attention of the Court that the contents of the return of service are not reflective that the Deputy Sheriff who had executed the report, had complied with **Rule 4 (5)**. It provides that if service is effected by the sheriff, it is his duty to explain the nature and contents of the process of documents served to the person upon whom it is being served and to state in his return that he had done so. He highlighted a further defect by indicating that *ex facie* the return of service the Deputy Sheriff did not explain to whoever unto whom he had effected the service, the nature and the contents of the document. He maintained that the explanation is intended to place

the person who is being served into a clear picture about the process and its significance.

[6] On yet another terrain, it was argued that the Deputy Sheriff had not acted in accordance with **Rule 4 (1)** in that there is no certainty in his return as to the actual place whereat the service was made. It was pointed out that the return of service speaks in general terms and lacks specifism on the question of the actual place where the transaction was made. The Rule provides that service of any process of the Court directed to the sheriff, shall be effected by the Sheriff in one or other of the following manners:

- (a) By delivering a copy of the process personally to the person to be served: provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor or curator of such minor or person under disability.
- (b) By leaving a copy of such process at the place of business or residence of the person to be served or if the guardian, tutor or curator aforesaid with the person who is apparently in charge of the premises at the time of delivery and who is apparently of the age of 16 or older.

[7] In order to satisfy the requirements for the granting of the rescission application, Counsel for the applicant submitted that the applicant has prospects for success in the main since he is unquestionably the customary heir of his late parents and that his mother lacked the credentials to make a Will depriving him of that right in support of his position reference was made to **sections 11, 13 and 14 of the Laws of Lerotholi.**

[8] Regarding the prospects in the merits, this Court has been persuaded by the Court of Appeal decision in **Tšepo Makatsanyane & Anor vs Motsekuoa Thekiso & Ors C of A (CIV) 23/2004**. In that case, the Court determined that a *natural heir* cannot be deprived of his right to inheritance by way of a Will.

[9] The Court has been persuaded to hold a view that it is doubtful that the applicant has been served by the process in the initial application. The return of service is not with certainty reflective that there was compliance with **Rule 4 (1) and (5)** respectively.

[10] Adv. Mokotleng has successfully convinced the Court that against the backdrop of factual and legal complications involved in this case, it would be wise if the proceedings are converted into a trial. The wisdom in the suggestion was acknowledged by Mr. Letsika for the applicant. The Court entertained the application on the understanding that the Molete J who had granted the default judgment is now permanently deployed in the Commercial Branch of this Court.

[11] In the premises it is ordered that:

- (a) The application for rescission is granted and there is no order as to costs.

(b) The motion proceedings are converted into a trial such that the papers before the Court will represent the pleadings, summons and respectively.

(c) The issues to be traversed in the trial would be:

- (i) The validity of the will and legibility of the late mother of the parties to have executed same.

**E.F.M. MAKARA**  
**ACTING JUDGE**

**For Applicant : Mr. Letsika instructed by Mei & Mei Attorneys**

**For Respondent : Mr. Mokotleng instructed by the Legal Aid**