

**IN THE HIGH COURT OF LESOTHO**  
**COMMERCIAL DIVISION**

**HELD AT MASERU**

**CCT/0139/2023**

**In the matter between:**

**RETHABILE POTLOANE**

**1<sup>ST</sup> APPLICANT**

**CLEOPHAS MUGOMBA**

**2<sup>ND</sup> APPLICANT**

**AND**

**RACECOURSE MALL (PTY) LTD**

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

**DEPUTY SHERIFF MONYAKO**

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

**Neutral Citation:** Rethabile Potloane & Another v Racecourse Mall (Pty) Ltd and Another [2024] LSHC 25 Com. (26 FEBRUARY 2024)

**CORAM: MOKHESI J**

**HEARD: 22 NOVEMBER 2023**

**DELIVERED: 26 FEBRUARY 2024**

## **SUMMARY**

**Civil Practice:** *The applicants seeking rescission of judgment on account that they were not served with the summons – The return of service being found to have misled the court into granting default judgment, the application succeeds with costs.*

## **ANNOTATIONS**

### **Cases:**

*Amcoal collieries Ltd v Truter 1990 (1) SA 1 (AD)*

*CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC 2007 – 2008) 463*

*Doti Store v Hershel Foods (Pty) Ltd (1982 – 84) LLR 338*

*Letsie v Commander of the Lesotho Defence Force and Others LAC (2011 – 2012)*

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*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623*

## JUDGMENT

### [1] **Introduction**

This is an application for stay of execution and rescission of the judgment which was granted by default of the defendants' appearance. At the heart of this application is the effectiveness of the service of court process at the chosen *domicilium citandi*. The reliefs sought are couched as follows:

*"1. That the normal rules pertaining to periods of service and notice be dispensed with on account of urgency.*

*2. Rule nisi be issued, calling upon Respondents to show cause if any, on return date to be determined by this honourable court why the following shall not be made final:*

*3. The execution of CCT/0139/2023 shall not be stayed pending finalisation hereof,*

*4. That the default in CCT/0139/2023 granted on the 13<sup>th</sup> Day of June 2023 by His Lordship Mokhesi J shall not be rescinded and Applicants be granted leave to file their opposition.*

*5. Costs of suit."*

### [2] **Background facts**

The applicants rent a space at the 1<sup>st</sup> respondent's sprawling shopping complex and are in terms of the sublease agreement expected to pay monthly rental. They trade under a name Barcelos which is a tenant. In the Standard

Lease Agreement both applicants signed as sureties and co-principal debtor jointly and severally for the due and timeous performance of all the obligations by the debtor with *domicillium citandi et executandi* being Ha-Foso, Lema Bus-stop Maseru Urban Area Plot No. 14262-038 &14262-039.

[3] The summons was issued in respect of both applicants due to non-payment of rental by Barcelos. In terms of the return of service filed of record, the 2<sup>nd</sup> applicant was served with the copy of summons personally at Ha-Foso. The applicants did not enter appearance to defend the matter hence on 13 June 2023 request for a default judgment was granted as prayed for by the 1<sup>st</sup> respondent's counsel. Thereafter, the execution process was set in motion. It was following the service of writ of execution on the 2<sup>nd</sup> applicant on 08 October 2023, that the latter set about rescinding the order which was granted by default by this court against him and the other applicant. It is on the basis of this order that the applicant approached this court on an urgent basis seeking the reliefs out in para.[1] of this judgment.

[4] The applicants' case is that no service of summons was effected on them, at least on the 2<sup>nd</sup> applicant, because although the 2<sup>nd</sup> applicant claims to be deposing to an affidavit on behalf of the 1<sup>st</sup> applicant, the latter has not filed any supporting or confirmatory affidavit. The 2<sup>nd</sup> applicant maintains that they were not served as their whereabouts were not known to the Deputy Sheriff. At paragraph 5.2 of his founding affidavit he avers that:

*“I was advised by my counsel of record and I believe same to be true that it is erroneous for the counsel for the plaintiff in CCT/0139/2023 to have obtained a default judgment while it is clear from the return of*

*service field of record that none of the defendants have been served due to the fact that their whereabouts were not known, I wish to disclose that the 1<sup>st</sup> Defendant resides in the United States of America and I personally am usually travelling between Lesotho and South Africa but I have a rented flat at Florida arrival centre Maser (sic) where I reside when I am in the country...”*

[5] It is incorrect for the 2<sup>nd</sup> applicant to say that the return of service makes it clear that the applicants’ whereabouts were unknown. On the face of the return of service he was served at a *domicillium citandi* stated in the Standard Lease Agreement. Whether indeed service was effected is a matter which I will deal with in due course. The 2<sup>nd</sup> applicant contends that he only became aware of the court order on the 08 October 2023 when being served with the writ of execution. He avers that he has some prospects of success, as the 1<sup>st</sup> respondent is claiming rentals for months when he was not in occupation of the space.

[6] **Issue for determination**

(i) Whether default judgment should be rescinded.

[7] I have already stated in the preceding paragraphs that the return of service on its face proves that the applicants were served at Ha-Foso. In terms of Standard Lease Agreement, the *domicillium executandi* is Ha-Foso where the return of service states that the 2<sup>nd</sup> applicant was served. The return of service is a *prima facie* proof of service. For the applicants to succeed impeaching it, clear evidence must be adduced (**Doti Store v Hershel Foods (Pty) Ltd (1982 – 84) LLR 338 at 339**)

[8] It is in line with this legal view that it is incumbent upon the applicants to prove on clearest evidence that he or she was not served. The applicants (defendants) contend that they were not served. The 2<sup>nd</sup> applicant maintains that he does not stay at Ha-Foso where the return of service states that he was served. Without an amendment to the Standard Lease Agreement the 2<sup>nd</sup> applicant cannot be allowed to say that he does not stay where in the contract he states he stays.

[9] However, the above be as it may, when the Deputy Sheriff Lebohang ‘Mika’ filed a supporting affidavit he makes a startling revelation which contradicts what is stated in the return of service, and on the basis of which the default judgment was granted. He avers as follows at paragraphs 6 and 7 of his supporting affidavit:

*“6. I aver that I attempted service on the applicants at Ha-Foso as the address provided in the summons. The Second Applicant, however, informed me that he was at the shop (Barcellos) where he conducted his business and I accordingly proceeded to the premises and served with him the summons.*

*7. I aver that, the Second Applicant was served with the summons on or about the 4 May 2023 at his place of business being Baracellos situated at the Maseru Mall as opposed to Ha-Foso, as noted from the return of service.”*

[10] There is a dispute of fact here whether the applicants were served with summons. The resolution of this dispute of fact must of necessity follow the approach in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**

**1984 (3) SA 623 (A) 634 – 5.** It is apparent that the return of service on which this court granted default judgment was misleading: The applicants were not served with summons at Ha-Foso as alleged. In fact, Deputy Sheriff recants he falsely stated in the return by saying that the true state of affairs is that the 2<sup>nd</sup> applicant was served at Barcellos on the 04 May 2023. In the circumstances of this case the facts averred by the applicants taken together with the admitted fact by Deputy Sheriff ‘Mika that the applicants were not served with summons at Ha-Foso as stated in the return justifies granting of the reliefs sought in the Notice of Motion. The Deputy Sheriffs are the most important officers of this court from whom the highest standard of honesty is expected, hence the principle that what they state in the return of service is regarded as being *prima facie* true. The Deputy Sheriff in this case did not acquit himself to the highest expected standard and it is to be regretted.

- [11] It is apparent that when the Deputy Sheriff could not find the applicants at the addresses provided in the contract, he went about looking for them as if service could not have been good if they were served at their chosen *domicillum citandi*. He was mistaken. It was stated in **Amcoal collieries Ltd v Truter 1990 (1) SA 1 (AD)** at p.p. 5 J – 6 D, that:

*“It is a matter of frequent occurrence that a domicillium citandi et executandi is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses domicillium citandi the domicillium he chooses is taken to be his place of abode. [citation omitted]. It is a well-established practice (which is recognized by rule 4(1)(a)(iv) of the Uniform Rules of Court) that if a defendant has*

*chosen a domicillium citandi, service of process at such place will be good, even*

*though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found [citations omitted]. It is generally accepted in our practice that the choice without more of a domicillium citandi is applicable only to the service of process in legal proceedings....”*

- [12] The applicants brought this rescission application in terms of Rule 27 of the High Court Rules 1980 judging by the language used (**Letsie v Commander of the Lesotho Defence Force and Others LAC (2011 – 2012) 48**). A court dealing with an application for rescission is not imprisoned to follow a chosen pathway, whether Rule 45, 27 or common law. It may consider the application under a pathway whose requirements have been satisfied by the pleadings (**CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC 2007 – 2008) 463** at para. [12].
- [13] In the present matter although the applicants have chosen to seek rescission in terms of rule 27, in my view, the requirements of rule 45(1)(a) are applicable. This is supported by the undeniable evidence before this court that the default judgment was granted based on a misleading return of service that the applicants were served at Ha-Foso. The order was therefore sought and granted erroneously in the absence of the applicants.



[14] In the result the following order is made:

(a) The application succeeds with costs.

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**MOKHESI J**

**For the Applicants: Adv. L. J Mokhatholane instructed by P. Masoabi  
Attorneys**

**For the 1<sup>st</sup> Respondent: Ms Z. Mayet from Harley & Morries**

**For the 2<sup>nd</sup> Respondent: No Representation**